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No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether Congress in 18 U.S.C. section 1161 intended to exclude the respective states from exercising their express powers given them under the Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

2. If section 1161 does not, by itself, provide for application of state licensing laws in Indian country, do the states nevertheless have the authority by virtue of the Twenty-first Amendment to require that liquor transactions in Indian country comply with all laws on the subject.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi - xvi
OPINION BELOW	1 - 2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2 - 4
STATEMENT OF THE CASE	4 - 8
SUMMARY OF ARGUMENT	8 - 12
ARGUMENT	
I THE CLEAR MEANING OF 18 U.S.C. § 1161 IS THAT CONGRESS INTENDED FOR ALL STATE LAWS, INCLUDING ITS LICENSING LAWS, TO APPLY TO LIQUOR TRAFFIC IN INDIAN COUNTRY	13 - 81
A. Introduction	13 - 18
B. Section 1161 Clearly And Unambiguously Provides That All Sales And Transactions Involving Liquor Occurring In Indian Country Must Conform To All State Laws On The Subject	18 - 30

		Pages
C.	The Legislative History of 18 U.S.C., § 1161, Conclusively Establishes a Congressional Intent For All State Law, Including Its Regulatory Laws, To Apply To Liquor Transactions In Indian Country	31 - 46
D.	18 U.S.C. § 1161, Considered In Light Of The Twenty-First Amendment And The States' Historical Authority Over Liquor Traffic, Should Be Construed To Permit The States To Exercise That Authority Over Liquor Traffic In Indian Country	46 - 54
E.	The Absence Of The Word Jurisdiction In § 1161 As It Relates To State Laws Does Not Prevent The State From Exercising Control Over Liquor Traffic In Indian Country Located Within Their Borders	54 - 67

		Pages
	F. The Construction Of § 1161 Placed On It By The Court Of Appeals Is Unworkable And Frustrates The Application Of State Laws	67 - 81
II	THE TWENTY-FIRST AMENDMENT OF ITS OWN FORCE REQUIRES THAT STATE LICENSING LAWS APPLY TO LIQUOR TRANSACTIONS IN INDIAN COUNTRY	82 - 94
	A. Introduction	82 - 84
	B. The Right Of The States To Regulate Liquor Traffic Within Their Borders Out-Weighs The Right Of Indians To Make Their Own Laws And Be Ruled By Them	85 - 89
	C. Application Of State Liquor Licensing Laws Under The Twenty-First Amendment Is Not Preempted By Federal Law	90 - 94
CONCLUSION		95

Pages

APPENDIX

Appendix A:

REPORT OF PROCEEDINGS
Hearing held before
COMMITTEE ON INTERIOR AND
INSULAR AFFAIRS
Subcommittee on Indian
Affairs,
H. R. 1055
March 15, 1953 A-1 - A-47

Appendix B:

REPORT OF PROCEEDINGS
Hearing held before
COMMITTEE ON INTERIOR AND
INSULAR AFFAIRS
Subcommittee on Indian
Affairs,
H. R. 1055
May 6, 1953 A-48 - A-63

Appendix C:

REPORT OF PROCEEDINGS
Hearing held before
COMMITTEE ON INTERIOR AND
INSULAR AFFAIRS
H. R. 1055
June 2, 1953 A-64 - A-77

TABLE OF AUTHORITIES

	Pages
CASES	
Addison v. Holly Hill Fruit Products, Inc. (1944) 322 U.S. 607	19
Agua Caliente Band of Mission Indians v. County of Riverside (9th Cir. 1971) 441 F.2d 1184	81
Allen v. McCurry (1980) 449 U.S. 90	53
American P. L. Co. v. Securities and E. Com. (1946) 329 U.S. 90	25
American Textile Mfrs. Inst. v. Donovan (1981) 452 U.S. 490	18, 19
Andrus v. Glover Construction Co. (1980) 446 U.S. 608	30
Bryan v. Itasca County (1976) 46 U.S. 373	44
California v. LaRue (1972) 409 U.S. 109	14, 15, 71, 80, 89
California v. United States (1978) 438 U.S. 645	9
California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97	88

Table of Authorities — Pages

CASES

Carter v. Commonwealth of Virginia (1944) 321 U.S. 131 — 14, 46, 47, 48

Central Machinery Co. v. Arizona Tax Comm'n (1980) 448 U.S. 160 — 90

Collins v. Yosemite Park Co. (1938) 304 U.S. 518 — 15, 87

Cooper Mfg. Co. v. Ferguson (1885) 113 U.S. 727 — 50

Craig v. Boren (1976) 429 U.S. 190 — 47, 88

Crowley v. Christensen (1890) 137 U.S. 86 — 13, 74

Dagan v. State (Wisc. 1916) 156 N.W. 153, 162 Wisc. 353 — 40

DeCoteau v. District County Court (1975) 420 U.S. 425 — 30

Department of Alcoholic Bev. Control v. Alcoholic Bev. Etc. Bd. (1982) 133 Cal.App.3d 184 Cal.Rptr. 367 — 70

Dept. of Revenue v. Beam Distilling Co. (1964) 377 U.S. 341 — 88

Table of Authorities — Pages

CASES

Diamond v. Chakrabarty (1980) 447 U.S. 303 — 19

Dick v. United States (1908) 208 U.S. 340 — 42

Duckworth v. Arkansas (1941) 314 U.S. 390 — 14, 15, 47

Erickson v. United States (1924) 264 U.S. 246 — 56

F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson (D.C. Cir. 1980) 636 F.2d 1300 — 56

Federal Trade Commission v. Mandel Bros. (1959) 359 U.S. 385 — 32

Fisher v. District Court (1976) 424 U.S. 382 — 86

Florida Lime and Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132 — 93

General Investment Co. v. New York C.R. Co. (1926) 271 U.S. 228 — 56

Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324 — 48

Indianapolis Brewing Co. v. Liquor Control Com. (1939) 305 U.S. 391 — 48

Table of Authorities — Pages

CASES

James Clark Distilling Co. v. Western Maryland R. Co. (1917) 242 U.S. 311 — 15

Jones v. Rath Packing Co. (1977) 430 U.S. 519 — 93, 94

Joseph E. Seagram & Sons v. Hostetter (1966) 384 U.S. 35 — 89

Joseph S. Finch and Co. v. McKittrick (1939) 305 U.S. 395 — 48

Kennedy v. United States (1924) 265 U.S. 344 — 83, 84

Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734 — 57

Lewis v. United States (1980) 445 U.S. 55 — 20

License Cases (U.S.) (1847) 5 How. 504 — 13

Mahoney v. Joseph Triner Corp. (1938) 304 U.S. 401 — 48

Maine v. Thiboutot (1980) 448 U.S. 1 — 9, 20, 31

Table of Authorities — Pages

CASES

McClanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164 — 16, 47

McCullough v. Commonwealth of Virginia (1898) 172 U.S. 101 — 50

Menominee Tribes v. United States (1968) 391 U.S. 404 — 59

Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145 — 87

Miller v. Ammon (1892) 145 U.S. 421 — 15

New York State Liquor Authority v. Bellonia (1981) 452 U.S. 714 — 89

Oliphant v. Squamish Indian Tribe (1978) 435 U.S. 191 — 58, 66

Organized Village of Kake v. Evans (1962) 369 U.S. 60 — 27, 28, 42

People v. Bray (1894) 105 Cal. 344 — 40

People v. Gebhard (Mich. 1908) 115 N.W. 54 — 40

Perrin v. United States (1914) 232 U.S. 478 — 17, 83, 84

Perrin v. United States (1979) 444 U.S. 37 — 30

Table of Authorities — Pages

CASES

St. Martin Lutheran Church v. South Dakota (1981) 451 U.S. 772 53

State v. Lindsey (Wash. 1925) 233 P. 327 40

State v. Rorvick (Ida. 1954) 277 P.2d 566 40

State v. Wise (Minn. 1897) 72 N.W. 843 40

State Board of Equalization v. Young's Market Co. (1936) 299 U.S. 59 47,89

Tate v. Smith (Neb. 1889) 78 N.W. 494 40

Territory v. Guyot (Mont. 1889) 22 P. 134 40

United States v. Batchelder (1979) 442 U.S. 114 30, 73

United States v. Mazurie (1975) 419 U.S. 544 9,23,28,62, 63,64,75,78

United States v. McBratney (1882) 104 U.S. 621 83

United States v. McGowan (1938) 302 U.S. 535 41

Table of Authorities — Pages

CASES

United States v. Mississippi Tax Comm'n (1973) 412 U.S. 363 — 87

United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599 — 87

United States v. Nice (1916) 241 U.S. 591 — 83

United States v. Powers (1939) 307 U.S. 214 — 68

United States v. Sharpnack (1953) 355 U.S. 286 — 62

Warren Trading Post v. Tax Comm'n (1965) 380 U.S. 685 — 90

Warren Treaty Post v. Tax Comm'n (1965) 380 U.S. 685 — 27

Washington v. Confederated Tribes of the Colville Indian Reservation (1980) 447 U.S. 134 — 32, 83

Watt v. Alaska (1981) 451 U.S. 259 — 19

White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136 — 90, 92

Williams v. Lee (1959) 358 U.S. 217 — 85, 86

Table of Authorities — Pages

CASES

Wisconsin v. Constantineau (1971) 400 U.S. 433 — 88

Ziffrin Inc. v. Reeves (1939) 308 U.S. 132 — 47,48,87, 89

CALIFORNIA STATUTES:

Cal. Stats. 1850 c. 133, pp. 408-409 Section 15 — 40

Cal. Stats. 1953 c. 146, p. 918 Section 1 — 39

CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 3 — 16, 47

Amendment XXI — Passim

FEDERAL CODES:

18 U.S.C. Section 13 — 60,61,63
18 U.S.C. Section 1153 — 60,61,63
18 U.S.C. Section 1154 — 65,73
18 U.S.C. Section 1156 — 65,73
18 U.S.C. Section 1161 — Passim
18 U.S.C. Section 1162 — 44
18 U.S.C. Section 1262 — 64
18 U.S.C. Section 3113 — 75
25 U.S.C. Section 261 — 91
25 U.S.C. Section 262 — 91
25 U.S.C. Section 263 — 91

Table of Authorites	Pages
FEDERAL CODES:	
25 U.S.C. Section 264	91
27 U.S.C. Section 121	15
27 U.S.C. Section 122	15
27 U.S.C. Section 201	65,91
28 U.S.C. Section 1254(1)	2
28 U.S.C. Section 1331	4
28 U.S.C. Section 1360	44
28 U.S.C. Section 2201	4
28 U.S.C. Section 2202	4
42 U.S.C. Section 602(a)(7)	20
42 U.S.C. Section 1983	20,21
FEDERAL STATUTES:	
2 Stat. 139	16, 17
2 Stat. 146	16, 17
4 Stat. 564	17
4 Stat. 729	17
26 Stat. 313 (Wilson Act)	15
37 Stat. 699 (Webb-Kenyon Act)	15
49 Stat. 977	65
62 Stat. 680	60
62 Stat. 758	60
62 Stat. 761	64
67 Stat. 586	28
67 Stat. 589	44,59,60,74
Reclamation Act of 1902, Section 8	21,22
FEDERAL REGULATIONS:	
25 C.F.R. Section 251.1	91
25 C.F.R. Section 251.3	91
36 C.F.R. Section 5.2	92

Table of Authorites — Pages

STATE STATUTES:

California Business and Professions Code Section 23000 et seq. (West 1964) 6,69,77
Section 23001 (West 1964) 57
Section 23300 69
Section 23658 71
Section 23789 70
Section 23790 70
Section 25175 72
Section 25177 72
Section 25609 72
Section 25614 72

STATE REGULATIONS:

Title 4, California Administrative Code
Section 27 72
Section 52 72
Section 53 72
Section 57.6 72
Section 57.7 72
Section 57.8 72
Section 62 72
Section 104 72
Section 130 72
Section 143.2 71
Section 143.3 71
Section 143.4 71

OTHER TEXTS AND AUTHORITIES:

Alcoholic Beverage Control (1960) 52

The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Columbia L. Rev. 1578 (1975) 51

Table of Authorities — Pages

The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 541-542 (1975) 44

Senate Report No. 722, 83rd Congress, 1st Session (1953) 38

No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BAXTER RICE, Individually
and as Director of Department
of Alcoholic Beverage Control
of the State of California

Petitioner,

v.

EVA REHNER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals,
Ninth Circuit

BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (Petn. for Writ of Cert. Appnd., pp. A1-49)[1] is reported at 678 F2d 1340. The judgment and findings of fact and

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1. Hereafter abbreviated as (Petn. Append.).

conclusion of law of the District Court are not reported and appear at pages JA-21 - 25 of the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on June 8, 1982. The petition for writ of certiorari was filed within 90 days of that date, on August 31, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XXI, § 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

United States Code, Title 18:

§ 1161:

"The provisions of section 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

§ 1154:

This statute appears at Petn., Append., pp. A-50 - 51.

§ 1156:

"Whoever, except for scientific, sacramental, medicinal, or mehanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined

not more than $2,000 or imprisoned not more than five years, or both.

"The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. section 1331 because the amount in controversy exceeded $10.000 and the controversy arose under the constitution, laws, or treaties of the United States. Jurisdiction was also invoked under 28 U.S.C., §§ 2201 and 2202. (J.A. pp. 6-7.)

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Eva Rehner is a member of the Pala Band of Mission Indians and owner and operator of a general store on the Pala Indian Reservation in San Diego County. Petitioner is the Director of the Department of Alcoholic Beverage Control of the State of California (hereafter, the Department). The dispute arose because Mrs. Rehner wishes to sell distilled spirits at her store and was informed that petitioner would require her to obtain a license from the Department in order to do so. (J.A. pp. 8-9.)

On February 10, 1977, Mrs. Rehner filed a complaint for declaratory judgment, mandatory injunction, and preliminary injunction. (J.A. p. 1.) On March 7, 1977, a first amended complaint was filed and petitioner moved to dismiss or for summary judgment on the ground the Department had the authority to require

Mrs. Rehner to obtain a state license under 18 U.S.C. § 1161. (J.A. pp. 1-2, 5, 16-17.) Judgment granting the motion to dismiss without leave to amend was filed and entered on May 11, 1977. (J.A. pp. 2, 18-20.)

On May 18, 1977, the District Court filed its Second Amended Findings of Fact and Conclusions of Law. The Court found Mrs. Rehner was a member of the Pala Band of Mission Indians and a federally licensed Indian trader who owns and operates a general store on an Indian reservation. The Court further found Mrs. Rehner desired to sell distilled spirits without first obtaining a license from the Department, and that the Department refused to permit her to sell distilled spirits without a license as required by California law. (Bus. & Prof. Code, §§ 23000 et seq. [West 1964].) (J.A. pp.21-23.)

The court concluded that an exception to the prohibition against sale of alcoholic beverages on an Indian reservation pursuant to 18 U.S.C. § 1161 exists, that the Pala Band of Mission Indians had adopted an ordinance on August 13, 1959, which was certified by the Secretary of Interior on April 11, 1960, providing that liquor traffic shall be lawful within Indian country if it was in conformity with the laws of California, and that Mrs. Rehner could not engage in the sale of distilled spirits without first obtaining a license from the Department in accordance with the laws of California. (J.A. pp. 23-25.)

On May 23, 1977, Mrs. Rehner moved the court for an order vacating the judgment or, in the alternative, for a rehearing and reconsideration. (J.A. pp. 3, 26-27.) The District Court denied the

motions on January 16, 1978. (J.A. pp. 28-29.)

On June 10, 1977, Mrs. Rehner filed a notice of appeal from the judgment. On June 8, 1982, the Court of Appeals reversed and held § 1161 preempted state licensing and distribution jurisdiction over tribal liquor sales in Indian country; accordingly, as long as Mrs. Rehner complied with a tribal ordinance, she was not required to obtain a California license to sell liquor in Indian Country. (Petn., Append., p. A-37.)

SUMMARY OF ARGUMENT

1. When Congress removed liquor prohibition in Indian country in 1953, it required that liquor traffic be "in conformity both with the laws of the State . . . and an ordinance duly adopted by the tribe . . . ." (18 U.S.C., § 1161.) The words "in conformity with" were

construed by the Court in California v. United States (1978) 438 U.S. 645, to require United States' compliance with state regulatory laws, including conditions imposed by a state regulatory agency. The word "laws" was construed by the Court in Maine v. Thiboutot (1980) 448 U.S. 1 to mean all laws, not some subset of laws. The word "both" should be interpreted to give to the states the same authority as is given to the tribes, as construed by the Court in United States v. Mazurie (1975) 419 U.S. 544. There is thus nothing on the face of the statute which suggests Congress meant some, but not all laws, and which prohibits a state from imposing its licensing laws on liquor traffic in Indian country.

This conclusion is supported by the legislative history of § 1161 which demonstrates that Congress intended to

remove discriminations against Indians seeking to purchase and drink alcohlic beverages. It was not the intent of the legislation to shield Indian retailers from state licensing laws. That Congress intended for all state laws, including licensing laws, to apply is further supported by Congress' awareness of pre-existing state laws prohibiting liquor transactions with Indians, and the Twenty-first Amendment, which particularly in 1953, placed the states in a superior position where liquor traffic is concerned. Thus, Congress knew that once federal prohibition was removed, the states, with their regulatory machinery in place, would fill the void.

The system devised by the Court of Appeals, where either the federal government or the tribes would apply state substantive standards, but not licensing

and distribution laws, is unworkable and frustrates this intention. The Court of Appeals did not define the term, failed to give any indication of what state laws are substantive standards, did not further the related goals of combating lawlessness on reservations at a reduced cost, and placed total reliance on a criminal system for the difficult task of regulating liquor traffic. Moreover, Congress knew the tribes were in no position in 1953 to assume the task of regulating liquor traffic and certainly could not do so without state assistance.

2. If § 1161 does not grant the authority for the states to control liquor traffic in Indian country it does not bar such control either. Because neither the tribe nor the federal government have enacted laws or rules regulating liquor traffic to the extent the states have, and

prior to 1953, the tribes never regulated liquor traffic, authority of the states to control liquor traffic within their borders pursuant to the Twenty-first Amendment does not infringe upon the right of Indians to govern themselves and does not conflict with any federal laws. If there is a conflict between the Twenty-first Amendment and the right of Indians to govern themselves or federal laws, the latter must give way to the paramount authority of a constitutional amendment.

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ARGUMENT

I

THE CLEAR MEANING OF 18 U.S.C. § 1161 IS THAT CONGRESS INTENDED FOR ALL STATE LAWS, INCLUDING ITS LICENSING LAWS, TO APPLY TO LIQUOR TRAFFIC IN INDIAN COUNTRY

A. Introduction

Beginning in colonial times and carrying forward to this day, except for the period between 1920 and 1933, the principle that it is the states which exercise control over importation distribution, and sale of intoxicating liquors within their borders is unchallenged. This Court first recognized that authority reserved to the states, and the necessity for state control over liquor traffic in the License Cases (US) (1847) 5 How. 504, 588, 627. As the Court later explained in Crowley v. Christensen (1890) 137 U.S. 86, 91:

"The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. . . It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business--to mitigate its evils or to suppress it entirely." See also California v. LaRue (1972) 409 U.S. 109, 114; Carter v. Commonwealth of Virginia (1944) 321 U.S. 131, 135-137; Duckworth v. Arkansas (1941)

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314 U.S. 390, 392-394; Miller v. Ammon (1892) 145 U.S. 421, 423-424.

With the passage of the Twenty-first Amendment, the powers of the states over the subject of liquor has increased. California v. LaRue, supra; Collins v. Yosemite Park Co. (1938) 304 U.S. 518, 538.

Indeed, Congress clearly understood the preeminent status of the states over the liquor industry when it enacted the Wilson Act in 1890 (c. 728, 26 stat. 313; 27 U.S.C. § 121) and the Webb-Kenyon Act in 1913 (c. 90, 37 stat. 699; 27 U.S.C. § 122). See generally James Clark Distilling Co. v. Western Maryland R. Co. (1917) 242 U.S. 311, 321-324.

Congressional treatment of Indians over the years has, of course, been considerably different. The policy has been one "'. . . of leaving Indians free

from state jurisdiction and control. . .'" McClanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164, 168. Congress' power over Indian affairs stems from the Indian Commerce Clause, Article I, § 8, Clause 3 of the Constitution and its exercise has been governed to a large extent by the character of the relationship between the United States and the Indian tribes. Id. at 173.

While the relationship between the United States and the Indian tribes has been usually difficult to define, in the area of liquor, it has been rather simple. Until 1953, the policy has been one of prohibition. In 1802, Congress first enacted legislation on the subject of Indians and liquor by authorizing the President to act to prevent the sale and distribution of liquor amoung the Indian tribes. Act of March 30, 1802, c. 13,

2 Stat. 139, 146. Thirty years later, Congress prohibited the introduction of liquor into Indian country and in 1834, Congress made criminal the sale of liquor to Indians in Indian country. Act of July 9, 1932, c. 174, § 4, 4 Stat. 564; Act of June 30, 1834, c. 161, 4 Stat. 729, 732-33.

Without interruption, Congress by statute and treaty (See Perrin v. United States (1914) 232 U.S. 478.) stayed true to that policy, until August 15, 1953, when it enacted 18 U.S.C. § 1161, (c. 502, § 2, 67 Stat. 586) which removed criminal penalties for sales of liquor to Indians and introduction and possession of liquor in Indian country, under certain conditions.

The question presented is whether this legislation means that a State may exercise its historical powers under the Twenty-first Amendment and the police power

over liquor traffic in Indian country in the same manner that it exercises those powers over the remainder of the territory within its borders, as petitioner contends, or whether, as the court below held, this power has, for the first time in this country's history, been placed not in the hands of the State, not in the hands of the Federal government, but under the control of the individual tribes. Analysis of this statute will reveal that it is the States which have been given the authority to control liquor traffic in Indian country.

B. Section 1161 Clearly And Unambiguously Provides That All Sales And Transactions Involving Liquor Occurring In Indian Country Must Conform To All State Laws On The Subject

The starting point in any analysis of a statute is with the words used. American Textile Mfrs. Inst. v. Donovan

(1981) 452 U.S. 490, 508. What is immediately apparent in the words of § 1161 is that the statute contains no technical terms and no definitions. Regarding non-technical terms:

> "Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc. (1944) 322 U.S. 607, 618. See also Watt v. Alaska (1981) 451 U.S. 259, 265-66; Diamond v. Chakrabarty (1980) 447 U.S. 303, 308.

It is similarly apparent that with regard to the critical language of § 1161 (". . . in conformity both with the laws of

the State . . .") no modifying words appear. The court below determined this phrase meant the act or transaction must conform to "substantive state standards," but such phraseology does not appear in the statute. There is absolutely nothing on the face of § 1161 which indicates that Congress placed any restriction or limitation on the scope of the words it employed and none should be implied. Lewis v. United States (1980) 445 U.S. 55, 60.

This is particularly true of the word "laws." In Maine v. Thiboutot (1980) 448 U.S. 1, 4, this Court faced the issue of whether the words "any laws" appearing in 42 U.S.C. § 1983 meant that claims could be made thereunder for a violation of the Social Security Act (42 U.S.C. § 602(a)(7)), or whether the remedy created by § 1983 applied only to constitutional violations. The Court held:

> "The question before us is whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." Id.

The phrase "in conformity with" has also been construed recently by this Court in California v. United States (1978) 438 U.S. 645. Section 8 of the Reclamation Act of 1902 requires the Secretary of Interior to proceed "in conformity with" State laws governing the "control, appropriation, use or distribution of water." California law required a permit from the State Water Resources Board for

any person to appropriate water and allowed the Board to impose conditions to insure the "reasonable" and "official" use of the water. Pursuant to this authority, the Board approved the application by the Bureau of Reclamation for a permit to appropriate water but attached 25 conditions to the permit. Id. at 650-52, and footnotes 7, 8. The court, after reviewing the legislative history of the Act and the federal-state relationship regarding water reclamation, concluded that section 8 required the Secretary of Interior to comply with state permit laws and conditions imposed by the states on the permit. The court thus concluded that the statutory language, interpreted in light of its history, required the United States to conform to both the substance and the form of state order law. Id. at 670-679. Since the deference accorded by Congress to state

water laws is identical to the deference Congress has given to state liquor laws, the fact that identical words are used clearly supports the conclusion that an identical meaning is intended.

Finally, the word "both" appears in § 1161. In United States v. Mazurie (1975) 419 U.S. 544, 557, the Court upheld the delegation of authority over reservation liquor transactions to the tribes because the tribes held a measure of sovereignty over both its members and its territory. Because the word "both" preceeds reference to "the laws of the State" and "an ordinance duly adopted by the tribe . . .," the only reasonable conclusion which may be drawn is that whatever power is given to the tribe is also given to the state. Only by the most tortured reading of this word could the court below determine that the power

delegated to the tribes under § 1161 was not the same power delegated to the states. See Petn. Append., A-13 - 15. This tortured interpretation of the plain meaning of the words used should be rejected. The act or transaction permitted under § 1161 must conform to both state laws and a tribal ordinance, and the only way to read this language is to conclude that state law, whatever it may be, and a tribal ordinance, whatever it may be, are to be treated the same.

Given the statutory language employed, and the construction to be given that language, the Court of Appeals' decision construing "the laws of the State" to mean substantive state standards is particularly troubling because a number of factors are missing. Under the Court of Appeals' reading, a delegation of power was made only to the tribes. Clearly, the

tribes are authorized to implement their own ordinances. But it is not at all clear who is to implement state laws. For a delegation of power to be made properly, Congress must delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated power. American P. L. Co. v. Securities and E. Com. (1946) 329 U.S. 90, 105.

If the states have been delegated the power to implement their laws, these rules are clearly satisfied, for the states are limited by their own policies and procedures. But if the states are not delegated this power, there is no statement set forth of general policy, of the recipient of the power to apply state law, and of the boundaries of that power. Everything must be implied including a definition of the term "substantive state standards." In light of the absence of any

language remotely suggesting a limitation on the applicability of all of a state's liquor laws in Indian country, and in light of the Court of Appeals' inability to state what Congress intended by this phrase, the only reasonable conclusion which may be drawn from the words employed is that Ccngress intended a delegation to the states, with the power in the states to enforce their laws as they know, understand, and execute them.

The notion that "laws of the State" means substantive state standards has a very fragile history, supported only by dicta.[2/]

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2. As will be shown, in fact, there was never any mention of this concept when HR 1055, the bill which ultimately became section 1161, was pending in Congress, nor does the phrase appear in the statute as it was enacted.

Respondent's argument below was that the word "standard," and therefore the exclusion of licensing laws from state authority to regulate liquor traffic, sprang from the Court's decision in Warren Treaty Post v. Tax Comm'n (1965) 380 U.S. 685. (R 108.) In point of fact, the Court merely cited § 1161, describing it as "permitting application of state liquor standards within an Indian reservation under certain conditions" in a footnote and without any discussion that the word "standard" was meant to prevent the states from exercising their traditional authority over liquor traffic. Id. at p. 687, n. 3.

If dicta should be permitted to control the result in this case, the dicta in Organized Village of Kake v. Egan (1962) 369 U.S. 60, should, where the Court, in the course of discussing the increase in state influence over tribes since 1929, said:

"Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. 67 Stat. 586, 18 U.S.C. § 1161. Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall." Id. at 73-74.

Again, in United States v. Mazurie, supra, 419 U.S. at 547, the court described § 1161 as follows:

In 1953 Congress passed local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated."

Thus, in neither Kake nor Mazurie did the court detect the idea that "laws of

the state" did not mean all state laws, including state licensing laws. Similarly, Congress never detected this concept. Rather, the Court in those cases, upon reading § 1161, reached the correct conclusion that state law applied with tribes given the power to prevent introduction of liquor onto reservations if they so desired.

In the name of statutory construction, the court of appeals has taken a statute with plain, non-technical, unambiguous language and by adding words and finding some words missing, manufactured an ambiguity. With an ambiguity at hand, the court had no difficulty then employing the canon of construction which requires ambiguities be resolved in favor of Indians, to reach the desired result - exclusion of state control over the liquor traffic within a state's boundaries but

within Indian country. The court went too far; "'[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent.'" Andrus v. Glover Construction Co. (1980) 446 U.S. 608, 619. See also DeCoteau v. District County Court (1975) 420 U.S. 425, 447. Cf. United States v. Batchelder (1979) 442 U.S. 114, 121-122; Perrin v. United States (1979) 444 U.S. 37, 49 n. 13. Congressional intent, unambiguous and evident from the face of the statute, clearly requires that an act or transaction involving liquor in Indian country conform to state law - all state laws - to the same extent an act or transaction occurring anywhere else in the state must conform to state law.

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C. The Legislative History Of 18 U.S.C., § 1161, Conclusively Establishes a Congressional Intent For All State Law, Including Its Regulatory Laws, To Apply To Liquor Transactions In Indian Country

The legislative history of § 1161 is rather sparse. What is absolutely clear in that history, however, is that there was no intent on the part of Congress to depart from the plain meaning of the words employed. See Maine v. Thiboutot, supra, 448 U.S. 1, 7-8.

The most striking feature of the legislative history is that the legislation had nothing to do with Indian retailers or jurisdiction. H.R. 1055, as originally introduced by Congressman Patten, was called "A Bill to terminate Federal discrimination against the Indians of Arizona." Appendix A, p. A-4. By removing federal discrimination, the bill was designed to allow Indian consumers

to purchase liquor like anyone else and to allow liquor to be sold in Indian country as it is sold elsewhere in the state. There is nothing in the title of the act which suggests that by terminating federal discrimination against Indians, Indians residing in Indian country would be placed in a position superior to that of non-Indians. The title of an act is often useful in determining the meaning of the words used in the act. Federal Trade Commission v. Mandel Bros. (1959) 359 U.S. 385, 388-389. Yet if not all state laws apply, as the Court of Appeals held, the result is superiority for Indians, not equality. Cf. Washington v. Confederated Tribes of the Colville Indian Reservation (1980) 447 U.S. 134, 155.

That equality and therefore application of all state laws, was the goal can be seen from the hearings on the bill

held on March 18, 1953, May 6, 1953, and June 2, 1953. Hearings on H.R. 1055 Before the House Committee on Interior and Insular Affairs, 83rd Cong. (See Append.) At the hearing held on March 18, 1953, Mr. Rhodes, the representative from Arizona, pointed out that the bill was introduced by his colleague from Arizona, Mr. Patten because federal liquor laws were discriminatory and unnecessary. He explained that the continued prohibition was detrimental to the Indians and would be harmful if continued. He also noted that Arizona was required by enabling legislation to include in its constitution a provision that no sale of liquor be made to an Indian or on Indian land. The bill, he pointed out, would allow Arizona to amend its constitution to remove these prohibitions. Appendix A, pp. A-8 - 11.

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The commissioner of the Bureau of Indian Affairs of the Department of Interior, Mr. Myer, appeared at the hearing and agreed that the prohibition relating to intoxicating liquor should be eliminated as discriminatory. When asked if the bill would have any effect on the statutes of the individual states, Mr. Myer replied:

> "We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided.
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> "I have been informed - and I did not see this report until last night, and it was rather late when I read it, and I did not have much time this morning, and I did not raise the question - but I have been advised that this report is intended to eliminate all of the sections in the statutes which discriminate against

> Indians and at the same time not interfere with State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law." (Emphasis added.) Appendix A, pp. 26-27.

Further testimony was heard on behalf of several Indian tribes in which support of the bill was voiced. The point made was that the intent of the bill as understood by these Indian tribes was to remove federal discrimination against them; there was no mention that Indians be placed in a position superior to non-Indians or that not all state laws be applied. Appendix A, pp. A-32 - 44.

At the hearing held on May 6, 1953, an unofficial report from the Secretary of the Interior was read into the

record. Again the point was made that the federal liquor laws relating to Indians was discriminatory and should be made inapplicable to transactions occurring not just in Arizona but throughout the United States ". . . if such transactions are in conformity with the ordinances of the tribes concerned and are not contrary to state law." Appendix B, pp. A-53 - 54. Later, a telegram indicating the support by the Navajo tribe of the bill and giving Navajos equal rights was read into the record. Appendix B, pp. A-58 - 59.

Lastly, on June 2, 1953, the sponsor of the legislation, Mr. Patten, appeared and at one point stated ". . . if this bill were passed to remove all discrimination, the Indians would still have to comply with the State law in every regard . . . ." Appendix C, p. A-69. Congressman Engle from California made the

point that the legislation was intended to equalize the treatment of Indians and noted that after California had repealed its laws preventing sales of liquor to Indians, a great deal of confusion had arisen because of the application of federal liquor laws. It was also noted that New Mexico had recently removed its restrictions. Appendix C, pp. A-73 - 75.

At no time during the discussion in any of these hearings was a motive other than removal of federal discrimination discussed. This was not a bill dealing with economic development or protection of Indian retailers; it was one designed to place Indians and Indian retailers in Indian country on an equal footing with non-Indians and retailers not on Indian reservations. And it is quite clear from the comments of all concerned that this equality was to be accomplished by the

application of state law, not some state laws, with Indian tribes given the power to veto introduction of liquor into their reservations if they so desired. See also S. Rep. No. 722, 83rd Congress (1953) (U.S. Code Cong. and Admn. News, p. 2399).

The Court of Appeals apparently assumed that with the passage of § 1161, the states, for the first time, were given the authority to regulate liquor transactions involving Indians and therefore required that a grant of jurisdiction be explicit. These Congressmen, however, knew better; the states for many years, with full knowledge of Congress, have prohibited transactions with Indians.

Indeed, the states have not merely exercised that power, in two cases, Congress has required them to do so. In the enabling acts which permitted Arizona

and New Mexico to enter the United States, Congress required that the two states enact irrevocable (without the consent of the United States) ordinances prohibiting the sale of liquor to Indians and the introduction of liquor into Indian country. Act of June 20, 1910, c. 310, § 2, 36 Stat. 557, 558. (New Mexico); § 20, 36 Stat. 569 (Arizona)[3/]

California likewise has prohibited liquor transactions with Indians for a long time. California's first prohibition was enacted on April 22, 1850. Cal. Stats. 1850, c. 133, pp. 408-409, § 15. This statute was enacted into the California Penal Code in 1872 and remained in force until 1953, when it was deleted. Cal.

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3. In recognition of this prohibition on sales to Indians or in Indian country in Arizona and New Mexico, Congress in enacting § 1161 gave the consent of the United States to repeal these provisions in the Arizona and New Mexico Constitutions. Act of August 15, 1953, c. 502, § 3; 67 Stat. 586.

Stats. 1953, c. 146, page 918, § 1.[2/] The prohibition was upheld as a valid exercise of the state's police power by the California Supreme Court in People v. Bray (1894) 105 Cal. 344, 38 P. 731.

California has not been alone; a number of other states and territories have enacted similar statutes and then upheld them. State v. Lindsey (Wash. 1925) 233 P. 327, 133 Wash. 140; State v. Rorvick (Ida. 1954) 277 P.2d 566, 76 Ida. 58; People v. Gebhard (Mich. 1908) 115 N.W. 54, 151 Mich. 192; State v. Wise (Minn. 1897) 72 N.W. 843, 70 Minn. 99; Dagan v. State (Wisc. 1916) 156 N.W. 153, 162 Wisc. 353; Territory v. Guyot (Mont. 1889) 22 P. 134, 9 Mt. 46; Tate v. Smith (Neb. 1889) 78 N.W. 494, 58 Neb. 296.

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4. It was apparently this legislation which was approved by the governor on April 8, 1953, to which representative Engle referred. Appendix C, pp. A-73 - 74.

Application of state liquor laws involving Indians is consistent with declarations from this Court that federal authority is not exclusive and that the states, under their police powers, have the right to legislate in order to protect people within their borders. In United States v. McGowan (1938) 302 U.S. 535, 539, while deciding that a Nevada colony was Indian country, the Court explained:

> "The federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only effect the operation, within the colony, of such state laws

as conflict with the federal enactment."

In Dick v. United States (1908) 208 U.S. 340, 353, the Court pointed out that the principle that a state has full and complete jurisdiction over all persons and things within its limits is of equal dignity with the principle that Congress' power to regulate commerce with Indians is superior and paramount to that of the state. The court, however, did not indicate this power was exclusive. "'[A]bsolute' federal jurisdiction is not invariably exclusive jurisdiction." Organized Village of Kake v. Evans, supra, 369 U.S. 60, 68. The tension between these two principles is resolved by prohibiting the state from acting if such action ". . . would impair the power of Congress to regulate commerce with the Indian tribes." Dick v. United States, supra, at 353.

Since Congress knew the states were in fact active in the Indian liquor area, Congress clearly anticipated that once federal prohibition was removed, state regulation would not impair its power to regulate commerce with Indians and consequently would control if the tribe also agreed to removal of prohibition. It was not a matter of Congress conferring authority on the states over liquor traffic with Indians, it was a matter of increasing the scope of that authority by removal of federal authority. Congress thus anticipated a termination of discrimination would occur simply by removing federal impediments to further state action and require liquor transactions be in conformity with state law. Under these circumstances, the Court of Appeals' extensive discussion concerning jurisdiction was wholly irrelevant.

Finally, it should be noted that Public Law 280 (67 Stat. 589, 18 U.S.C. § 1162 and 28 U.S.C. § 1360) was enacted at the same time as § 1161. This legislation gave several states certain criminal and civil jurisdiction over Indians in Indian country. According to this Court in Bryan v. Itasca County (1976) 426 U.S. 373, 380, the primary concern of Congress in enacting these laws ". . . was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." The method chosen--conferring of jurisdiction on the states--was financial; it was the cheapest solution available to Congress. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L.Rev. 535, 541-542 (1975).

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The same should be true of liquor enforcement. Allowing the states to shoulder the responsibility of regulating liquor traffic in Indian country satisfies both of these motivations; the states already have the machinery to enforce its laws and the states will pay for that enforcement. If the states are excluded from enforcing their laws, then the added responsibility of enforcement falls onto tribal or federal shoulders, along with its added costs. Since Congress believed the federal and tribal law enforcement capability was inadequate to begin with, Congress surely could not expect that capability to cope with the increased burdens placed on it by repeal of prohibition in Indian country.

In summary, the legislative history supports the conclusion initially drawn from the plain meaning of the words

used, that the states may regulate liquor traffic in Indian Country to the fullest extent allowed by their laws. There is absolutely no legislative support for the proposition that the legislation was intended to exclude state licensing and distribution laws, and therefore preclude the states from enforcing those laws.

D. 18 U.S.C. § 1161, Considered In Light Of The Twenty-First Amendment And The States' Historical Authority Over Liquor Traffic, Should Be Construed To Permit The States To Exercise That Authority Over Liquor Traffic In Indian Country

When Congress considered removing federal barriers to liquor traffic in Indian Country in 1953, it was undoubtedly aware of the states' plenary authority over liquor traffic within their borders. That authority springs from the police power reserved to the states and the Twenty-first Amendment. Carter v. Commonwealth of

Virginia, supra, 321 U.S. 131, 135-137; Duckworth v. Arkansas, supra, 314 U.S. 390, 392-394; Ziffrin Inc. v. Reeves (1939) 308 U.S. 132, 138-139. See generally, Craig v. Boren (1976) 429 U.S. 190, 205-206.

The early cases interpreting the Twenty-first Amendment took the position that it in effect overrode the provisions of the commerce clause (Art. I, § 8, cl. 3) of the United States Constitution.5/ The Court in State Board of Equalization v. Young's Market Co. (1936) 299 U.S. 59, held that a California statute enacting a license fee for the privilege of importing beer into the state did not violate the commerce clause against imported beer wholesalers, since the Twenty-first

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5. This is the same clause from which Congress derives its power to regulate commerce with Indian tribes. McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. 164, 172, n. 7.

Amendment gave California the authority to simply prohibit the importation of liquor into the state in violation of any laws of the state. See also Ziffrin Inc. v. Reeves, supra, 308 U.S. 132, 138 ("The Twenty-first Amendment sanctions the right of a state to legislate concerning its intoxicating liquors brought from without, unfettered by tme Commerce Clause"); Carter v. Commonwealth of Virginia, supra, 321 U.S. 131; Mahoney v. Joseph Triner Corp. (1938) 304 U.S. 401, 403-404; Joseph S. Finch and Co. v. McKittrick (1939) 305 U.S. 395; Indianapolis Brewing Co. v. Liquor Control Com. (1939) 305 U.S. 391, 394.

It was not until 1964, 11 years after Congress enacted § 1161, that the situation changed. In Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324,

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the court first described those early years as follows:

> "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants designed for use, distribution, or consumption within its borders . . . This view of the scope of the Twenty-first Amendment with respect to a state's power to restrict, regulate, or prevent the traffic or distribution of intoxicants within its borders has remained unquestioned." Id. at 330.

When the court in Hostetter declared that the Twenty-first Amendment did not repeal the Commerce Clause (id. at 332) this was the Court's first

announcement that there were limits on the Twenty-first Amendment. But in 1953, those limits have not yet been announced. Thus, in enacting § 1161, Congress undoubtedly felt itself required to recognize the authority of state to regulate liquor traffic in Indian Country and this is what Congress did when it required that liquor traffic must be made "in conformity with" state law. To ignore the impact of the Twenty-first Amendment and the historical role of the states in their efforts to control liquor traffic, the Court of Appeals ignored the true relationship between the federal government and the states, and failed in its duty to construe together a statute and a constitutional provision on the same subject. Cooper Mfg. Co. v. Ferguson (1885) 113 U.S. 727, 737. See also McCullough v. Commonwealth of Virginia (1898) 172 U.S. 101, 112.

The historical context should also be examined. Passage of the Twenty-first Amendment accomplished the repeal of national prohibition and was intended to permit each state to decide for itself the proper methods of regulating liquor traffic within its borders. States were permitted to become "dry" or "wet" without fear that the Commerce Clause would be used as a weapon to free interstate trafficking in liquor from state control. See Comment, The Effect of The Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Columbia L Rev 1578 (1975).

As the legislative history has shown, Congress had this purpose in mind when it enacted § 1161. First, the states and then the tribes were given the authority to determine if Indian country was to be "wet" or "dry." In 1954, the year after enactment of § 1161, 83.7 percent of the

United States' population resided in "wet" areas, two states with substantial areas of Indian country, Mississippi and Oklahoma, were entirely dry, and most other states had "local option" legislation which permitted localities within a state the option of remaining "dry." See, The Joint Committee of the State to Study Alcoholic Beverage Laws, Alcoholic Beverage Control, (1960) at page 78. Thus, § 1161 represents a congressional balancing of federal-Indian interests in regulating liquor traffic in Indian country with the interests of the states regulating liquor traffic within their borders.

Not only did the Court of Appeals fail to consider any of this, its requirement that a grant of state jurisdiction over liquor traffic in Indian country be express (Petn. Append. pp. 6-A - 7-A) caused an even more startling consequence: the

repeal of the Twenty-first Amendment in Indian country by implication. Repeal of statutes by implication is disfavored (Allen v. McCurry (1980) 449 U.S. 90, 99) and a repeal will be found, in the absence of some affirmative showing of an intention to repeal, only when two statutes are irreconcilable (St. Martin Lutheran Church v. South Dakota (1981) 451 U.S. 772, 778). There is nothing in § 1161 to indicate Congress did not intend that the Twenty-first Amendment would apply, and application of the Twenty-first Amendment in Indian country is not irreconcilable with Congress' intention to remove liquor discriminations against Indians. If this case must be decided on what Congress did not say, then a construction which avoids an implicit repeal of a constitutional amendment should be preferred to a

construction which is based merely upon a rule of statutory construction.

E. The Absence Of The Word Jurisdiction In § 1161 As It Relates To State Laws Does Not Prevent The State From Exercising Control Over Liquor Traffic In Indian Country Located Within Their Borders

The Court of Appeals' reasoning in this case may be reduced to one point: Congress did not use the word "jurisdiction" when it referred to state laws and this omission meant Congress did not intend that a state's regulatory laws should apply. (Petn.-Append. pp. A-10 - 27.) However, Judge Goodwin's point that the majority opinion discussion concerning the "conferring" of jurisdiction upon the states ". . . is interesting but seems unresponsive to the purpose of the statute" (id. at A-46) is the correct one.

As we have shown, the purpose of § 1161 was to allow Indians to purchase liquor on an equal footing with non-Indians, and the mechanism Congress chose was removal of federal prohibition as long as liquor traffic conformed to both state laws and a tribal ordinance. State laws are designed to control the liquor industry, including such business matters as the identity of the retailer, the location of the outlet, potential consumers and employees, hours of operation, payment of taxes, recordkeeping, labeling and advertising, and the like.

Viewing the matter as the Court of Appeals did as one of jurisdiction is

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inappropriate.[6/] Jurisdiction is apparently used by the court in a judicial sense, of the power of the court to entertain suits and decide cases (General Investment Co. v. New York C.R. Co. (1926) 271 U.S. 228, 230; Erickson v. United States (1924) 264 U.S. 246, 249) and so viewed, requires jurisdiction by the court over the persons and subject matter of the action (F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson (D.C. Cir. 1980) 636 F.2d 1300, 1318).

The Department in this case is not interested in California acquiring judicial jurisdiction over the person in order to

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6. It has already been shown that Congress knew the states had been exercising some control over liquor traffic with Indians. If this must be viewed in jurisdictional terms, Congress thus knew the states already possessed jurisdiction over the subject matter, and any further grant of such jurisdiction was unneccessary.

resolve controversies or to punish wrongdoers. The aim of regulation in California is protection of the public, not punishment (Cal. Bus. and Prof. Code, § 23001 [West 1964]; Lacabanne Properties Inc. v. Dept. of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 190, 67 Cal.Rptr. 734) and that is accomplished by the state exercising power over a license. Through the use of a license, a state can make all the decisions necessary to properly implement its decisions, without ever requiring the services of a court. It is clearly in this sense--the sense of control over liquor traffic within a state--with which Congress was concerned when it enacted § 1161, and it is in this sense that the Department seeks to require Mrs.

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Rehner obtain a license before she may sell liquor.[7]

Moreover, viewing the matter as one of jurisdiction merely fragments the matter. The situation of jurisdictional concepts results in the states not having control over Indian retailers, then it also results in the tribes not having control over non-Indian retailers. Oliphant v. Suquamish Indian Tribe (1978) 435 U.S. 191. It is much more reasonable to conclude that Congress intended joint control by both states and tribes than partial control by each.

Because Congress was interested in controlling liquor traffic, not providing for state punishment of criminals or the settling of civil disputes, a comparison of

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7. There is no issue before this Court regarding state criminal enforcement of California's liquor laws.

the wording of § 1161 with the wording of Public Law 280 accomplishes little. Public Law 280 was truly concerned with jurisdiction in the traditional, judicial sense, which Congress evidently realized, while § 1161 was not.

But if Public Law 280 must be read in pari materia with § 1161, then the intent of those laws should be examined, not simply the words. Public Law 280 was intended to allow states to assume criminal and civil jurisdiction over certain matters, in the place of the federal government. See Menominee Tribes v. United States (1968) 391 U.S. 404, 411-412. Clearly, the intent of § 1161 is the same. The construction offered by the Court of Appeals, however, requires federal regulation to continue, and in fact, requires federal authorities to know state laws so that violations of those laws may

result in federal prosecutions. Where the Court of Appeals erred is in concluding that federal prosecution was the sole method for regulating liquor traffic. By giving the states the regulatory authority to enforce their liquor laws allows the United States to play a lesser role in liquor matters in Indian country, and accordingly advances the intent of Congress expressed in § 1161 and Public Law 280.

The reasoning of the Court of Appeals regarding a comparison between § 1161 and other statutes, in particular, the Assimilative Crimes Act, 18 U.S.C. 13 (c. 645 62 stat. 680) and the Major Crimes Act, 18 U.S.C. section 1153 (c. 139 62 Stat. 758) is also faulty. The Court of Appeals correctly pointed out that these statutes incorporate state laws into the definition of federal crimes but gives the state no jurisdiction. (Petn. Append. A-21 - 24.)

That intent is clear from the face of the statutes and it is difficult to see how Congress could have more clearly expressed that purpose. But from this premise, the Court of Appeals incorrectly concluded that § 1161 incorporates state 'standards,' not all a state's laws, and that as a result of this incorporation, state regulatory control is excluded. There is nothing in § 1161 which supports either of these conclusions.

With respect to standards, § 1153 specifically refers to laws ". . . enforced at the time of such offense . . ." while § 13 refers to laws ". . . enforced at the time of such act or omission." Thus, the statutes clearly state which laws are to be applied and reflect every addition, repeal, or amendment to those laws. However, § 13 previously referred to laws "now enforced" or "now provided" (see United States v. Sharpnack

(1958) 355 U.S. 286, 291-292), which suggests that only those state laws in existence at the time the federal statute was enacted would be incorporated. In either event, Congress was concerned that potential defendants knew exactly which laws were to be incorporated. In § 1161, Congress' failure to modify the word "laws" points away from a conclusion that it meant to incorporate only state "standards," meaning something less than all the state's laws, and points toward the conclusion Congress intended all the state laws to apply, including licensing laws.

This should be clear from United States v. Mazurie, supra, 419 U.S. 544. The Mazuries were convicted of violating § 1154 because they failed to obtain a tribal license. There is nothing in § 1161 to suggest that a federal prosecution may not be maintained because a non-Indian violated

a tribal licensing requirement just as there is nothing in § 1161 to suggest a federal prosecution may not be maintained because an Indian violated a state licensing requirement. If a federal crime occurs in the first case, it occurs in the second, because the language in § 1161 ("in conformity both") is identical.

Just as important is the absence of any indication in § 1161 that a state regulatory system, enforced by the state, cannot coexist with the federal penalties. Sections 13 and 1153, and the surrounding circumstances, plainly indicate that state criminal laws would be employed by the United States in federal criminal prosecutions. There is no language in § 1161 which is similar to this language. But the language which is used suggests that just as a tribe may insist upon a tribal license (United States v. Mazurie,

supra), so too may a state insist upon a state license. And it necessarily follows that if a license may be required, action against it may be undertaken.

One subject area the Court of Appeals did not consider was other federal laws on the subject of liquor. For example, 18 U.S.C. § 1262 (Act of June 25, 1948, c. 645, 62 Stat. 761.) makes criminal the importation or transportation into a state of liquor if such liquor is not accompanied by a permit or license required by the state or is prohibited completely by the state. Congress then incorporated into § 1262 ". . . the definition of intoxicating liquor contained in the laws of the respective States . . ." Had Congress intended in § 1161 to incorporate only some state laws, it could, using § 1262 as a model, declare which such statutes would be incorporated.

Further, had Congress intended that state licensing laws not apply, it is reasonable to conclude that Congress would have treated liquor traffic in Indian country as it treats liquor traffic in interstate and foreign commerce. The Federal Alcoholic Administration Act, 27 U.S.C. §§ 201 et seq. (Act of August 29, 1935, c. 814, § 1, 49 Stat. 977) contains comprehensive legislation designed to regulate interstate and foreign commerce in liquor through a permit system. It may be possible to prohibit liquor traffic in statutes such as 18 U.S.C. §§ 1154 and 1156, but once liquor traffic is permitted and the need rises to regulate it, the act makes it clear Congress was well aware that a comprehensive system was required. Certainly the tribes had no comparable system available in 1953; they had lived under prohibition since 1802, and could not be expected to fill the void

created when prohibition was lifted.[8] But the states had such machinery available. by not creating a system comparable to the Federal Alcohol Administration Act to be applicable to liquor traffic in Indian country, and instead requiring liquor traffic conform to the laws of the state, Congress expressed its intention that state laws, including licensing and distribution laws applied.

It should be clear by this time that what Congress did not say should not be given the weight that should be placed on the words Congress did use. One can speculate and debate at length as to a better or clearer way to convey an idea. Taking the words Congress did use, in light of the legislative history of § 1161, in light

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8. Few Indian tribes even had court system at this time. Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. 191, 197.

of the extent of state action and power over liquor traffic both in and out of Indian country prior to 1953, and in light of the Twenty-first Amendment, the conclusion that all of the states laws on the subject of liquor applied in Indian country is a compelling one.

F. The Construction Of § 1161 Placed On It By The Court Of Appeals Is Unworkable And Frustrates The Application Of State Laws

It is one thing for a court to interpret a statute, it is quite another for the statute to be implemented as so construed. Accordingly, proper interpretation of a statute requires the court to consider how well its interpretation will work in practice.

"'There is a presumption against a a construction which would render a statute ineffective or inefficient or which would cause grave public injury

or even inconvenience.'" United States v. Powers (1939) 307 U.S. 214, 217.

The construction given § 1161 by the Court of Appeals conflicts with this presumption. According to the Court of Appeals, California cannot license Indians who sell liquor on reservations and therefore cannot enforce any of its laws through disciplinary actions against the licensee, nor can California even bring an action for declaratory or injunctive relief against a tribe to compel or to enforce California standards. (Petn. Append. p. A-36.) In other words, the California Legislature may pass laws called "substantive state standards," but California cannot enforce those laws in Indian country.

The court announced this limitation on state authority in broad terms. When the matter of implementation arises, significant problems also arise. The first and most

obvious is whether a distinction between substantive state standards and "state licensing and distribution jurisdiction" (Petn. Append. pp. A-21, 27) may be drawn. The California Alcoholic Beverage Control Act, (Cal. Bus. and Prof. Code, §§ 23000 et seq. [West's 1964])[9/] makes no distinction between state standards and licensing, and indeed, many standards are embodied in statutes which appear at first blush to be licensing stautes. Section 23300 requires any person engaging in the liquor business to obtain a license but not everyone may hold a license. An applicant for a license must state he has not been convicted of a felony and has not violated and will not violate any provision relating to alcoholic beverages. § 23952. If the application is for a retailer's license, the premises must be

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5. All references will be to this code unless otherwise noted.

approved by the Department which has the authority to deny an application for a license if issuance would tend to create a law enforcement problem or result in or add to an undue concentration of licenses. § 23958. See Department of Alcoholic Bev. Control v. Alcoholic Bev. Etc. Bd. (1982) 133 Cal.App.3d 814; 184 Cal.Rptr. 367. Thus, in these statutes, the California Legislature has set forth the substantive policy that protection of the public welfare and morals requires limits on the number, identity of licensees, and the location of retail establishments. See also § 23789 (restrictions on locations near churches, hospitals, schools and public playgrounds, § 23790 (compliance with zoning laws)). But if licensing laws are not applicable to Indian country, then anyone may sell liquor anywhere within Indian country, regardless of the effect such laws may have on the

public welfare and morals of Indians and non-Indians alike.

Where the line between substantive state standards and licensing may be drawn is another difficult problem. Obviously a state statute prohibiting a sale of liquor to a minor (§ 23658) would be a substantive state standard, but are department regulations prohibiting nude dancing such standards? Title 4, Cal. Admin. Code, §§ 143.2 through 143.4. Those regulations are substantive in the sense they are designed to protect the public welfare and morals. This court in California v. LaRue, supra, 409 U.S. at 115-116 agreed. But because the rules were promulgated by California's licensing agency, they may well not carry over into Indian country. Indeed, the entire administrative structure in Title 4, Cal. Admin. Code, chap. 1, which includes numerous substantive

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rules,[10] may well be excluded from Indian country by the Court of Appeals' decision.

Even if the standard appears in a state statute, its character is not always clear. For example, it is a misdemeanor in California to refill packages to which federal revenue stamps have been attached (§25176), to sell such refilled packages (§25177), to sell alcoholic beverages for on-premises consumption without proper presentation of a brand-type, or character (§§ 25609, 25614), to sell as a whiskey a liquor product that has not met specific standards (§ 25175), and so forth. It simply

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10. See e.g. Title 4, Cal. Admin. Code, §§ 27 (sale of alcoholic beverages only in original package), §§ 52 and 53 (restrictions on the giving of gifts and samples), §§ 57.6, 57.7 and 57.8 (qualifications of a manager and lessee), § 62 (law enforcement personnel prevented from holding licenses to protect against conflict of interest), § 104 (prevention of misleading advertising), § 130 (labeling requirements) etc.

cannot be determined accurately simply by looking at a statute whether it is a substantive state standard.

What was absolutely necessary, and what the Court of Appeals failed to do, was provide an adequate definition of substantive state standard so that the above statutes, as well as the hundreds of other California statutes on the subject, and the statutes of other states employing a licensing System, and those employing a monopoly system, could be classified properly. This is not a mere intellectual exercise. By failing to conform to state law, a person engaged in liquor traffic in Indian country has committed a crime under 18 U.S.C., § 1154 or 1156. Therefore, to avoid a charge that the statutes are unconstitutionally vague (see United States v. Batchelder, supra, 442 U.S. at 123), a clear definition is absolutely necessary. The Court of Appeals' failure in

this regard renders the criminal sanctions virtually unenforceable, with the result that liquor traffic in Indian country is under no state control whatsoever.

The Court of Appeals' system is unworkable for other reasons. By removing state licensing authority, the court has removed state enforcement authority, which leaves the authority in either the tribes or the federal government, neither of which is equipped to handle the matter. As previously pointed out, Public Law 280 was enacted because of the problem of lawlessness on certain Indian reservations and the method chosen was selected because it was the cheapest solution. The problems of lawlessness and finances are magnified in the liquor field. Crowley v. Christensen, supra, 137 U.S. at 91. If law and order had broken down in Indian country while liquor prohibition was in effect, and Congress

intended to reduce its expenditures in Indian country, it simply does not follow that liquor regulation could be maintained in Indian country once prohibition was removed. The problem of lawlessness would increase once liquor was legalized with the inevitable result that without additional federal funds, neither the tribes nor the United States government would properly enforce state liquor laws.[11]

That it was Congress' intent to decrease the federal role in this area, not increase it, may be discerned from the reference in § 1161 to 18 U.S.C. § 3113. Section 3113 gives certain persons in federal service search and seizure power if there is probable cause to believe any person is about

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11. It is interesting to note that the Mazuries operated the Blue Bull without a tribal license for one year before the United States acted. United States v. Mazurie, supra, 419 U.S. at 548.

to introduce liquor into Indian country in violation of law. Clearly this statute is an investigative tool to enhance the law enforcement capability of those persons charged with enforcing federal prohibition. If the states were to be excluded from enforcing their own laws, and that responsibility were to remain with the United States, it is logical to assume Congress would have intended that these officials retain their search and seizure powers. By making §3113 inapplicable, Congress in §1161 demonstrated its desire that federal officials no longer investigate liquor traffic in Indian country if such traffic is in conformity with state and tribal laws. This view further suggests that the states and the tribes are the ones to determine conformity with their respective laws.

Assuming some type of law enforcement could be maintained, how would it

work? There is no mechanism for determining which state laws must be followed once a definition of state substantive standards is given. Nor is there a suggestion as to who is to make these decisions - the federal government, the tribes, the federal judiciary, or the states. Once it is determined which laws apply, the question arises regarding enforcement. Again, the Court of Appeals leaves this open. Under California law, the Department is given the primary responsibility of enforcing the Alcoholic Beverage Control Act. Where alcoholic beverages are sold in Indian country to non-Indians or are sold by non-Indian lessees on Indian lands to non-Indians, must California now look to the tribes for proper enforcement for the states substantive standards? If the tribes fail in this responsibility, the states are left unprotected. The Court of Appeals held the

states could not sue the tribes and there is a real question as to whether the federal government would step in to fill this void.

The only federal mechanism for enforcing states standards is through a federal prosecution. See United States v. Mazurie, supra, 419 U.S. 544. Thus, a state which detects violations of its state substantive standards must obtain investigative services from federal agencies, prosecutorial services from a local United States attorney, and the cases must be brought in federal courts.

Further, it is virtually impossible to regulate an industry such as the liquor industry solely under criminal laws. The Court of Appeals' decision anticipates the criminal law as the sole method for enforcing substantive state standards. A complex regulatory scheme has been created by California, with the threat of sanctions

against the license the most effective and common method for insuring complaints (see §§ 24200 et seq) with the aim of the system being protection of the public (see § 23001).

In contrast, criminal laws are obviously designed for a different purpose, to punish. If the goal of regulation were simply prohibition of liquor in Indian country, as was the case from 1832 until 1953, criminal penalties would work. They do not when strict regulation is required. The criminal system operates too slowly and cannot adapt to the ever-changing market place in the same manner an administrative agency can. There is no rule-making power delegated to any agency which can act on behalf of the People in the manner the Department may. Moreover, criminal penalties may be wholly inappropriate in many situations where violations are slight. For example, a licensee who permits nude dancing

may and should have action taken against his license (California v. LaRue, supra, 409 U.S. 109) but whether such conduct should be punished criminally is certainly debatable.

In light of the foregoing problems, the opinion of the Court of Appeals should be rejected. In its place should be a construction which allows state regulatory laws to be applied to the same extent in Indian country that they apply elsewhere in the state, and allow tribal law to be applied concurrently with them. Concurrent operation of laws of different sovereignties is a common occurrence in this country and should work equally well in this case.

This is particularly true here. Although an Indian retailer may operate his establishment in Indian country, the effect of the transaction may well be felt outside the country. In a heavily populated state like California, Indian tribes are not

necessarily located in isolated. For example, the Agua Caliente Band of Mission Indians and its members control more than 26,000 acres of the Palm Springs area, nearly one half of the entire city, with the Indian lands interest first among non-Indian lands in a checkerboard pattern. Agua Caliente Band of Mission Indians v. County of Riverside (9th Cir. 1971) 442 F.2d 1184, 1185. Given the size of the population of Palm Springs and the tourists it draws, a substantial proportion of the customers of a retail liquor outlet in Indian country will be non-Indian. There is absolutely no reason why state licensing laws should be applied on one side of the street in Palm Springs and not be allowed to apply on the other side simply because the latter is Indian country. Congress did not so intend and the court should not construe the statute to reach this result.

* * * * *

II

THE TWENTY-FIRST AMENDMENT OF ITS OWN FORCE REQUIRES THAT STATE LICENSING LAWS APPLY TO LIQUOR TRANSACTIONS IN INDIAN COUNTRY

A. Introduction

To this point, we have urged that section 1161 should be construed to permit all state laws, including its licensing laws, to apply to liquor transactions in Indian country. In this section, it is urged that even if section 1161 does not require that liquor transactions in Indian country must conform to all state laws, including its licensing laws, such laws must be satisfied by virtue of the state's police powers as protected by the Twenty-first Amendment. The Court of Appeals rejected this argument. (Petn. Append. pp. A-30 - 32.)

At the outset, the competing interests, and their underlying bases, should be delineated. With respect to the states,

their traditional powers to regulate liquor traffic within their borders, augmented by the Twenty-first Amendment has already been discussed. Furthermore, some state laws have been applied to acts or transactions within Indian country even without constitutional authority such as the Twenty-first Amendment. See Washington v. Confederated Tribes of the Colville Indian Reservation, supra, 447 U.S. 134; United States v. McBratney (1882) 104 U.S. 621.

Authority for Congress to regulate liquor in Indian country and therefore prohibit Indians from liquor consumption is found in part in the power of Congress to regulate commerce with Indians and in part in the relationship established between the federal government and tribal Indians. United States v. Nice (1916) 241 U.S. 591, 597; Perrin v. United States, supra, 232 U.S. 478, 482-485; Kennedy v. United States (1924)

265 U.S. 344, 345. See also McClanahan v. Arizona State Tax Comm'n., supra, 411 U.S. 164, 172 n. 7. Although there has been a geographical component to the exercise of that power, it has been incident only to the presence of Indians and their status as wards of the government. Hence, the prohibition against introduction of liquor into Indian country in the past could not go beyond that which was reasonably necessary to their protection. Perrin v. United States, supra, at 486. In other words, it is the Indian people, not places, which Congress protected by federal prohibition. But by enacting § 1161 in 1953, Congress removed its protection over Indians from liquor and in effect, left the matter of their protection in the hands of state and tribal governments.

It is against this background that we examine the relationship between the states and the tribes.

B. The Right Of The States To Regulate Liquor Traffic Within Their Borders Outweighs The Right Of Indians To Make Their Own Laws And Be Ruled By Them

Because Congress has not expressly stated in § 1161 that state licensing laws, could not apply to liquor traffic involving Indians or Indian country, state action can be prevented from applying if it ". . . infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee (1959) 358 U.S. 217, 220.

On the historical level, while the states have been regulating liquor traffic within their borders since colonial times, the tribes have had no history at all regarding the regulation of liquor traffic. Until 1953, federal and state prohibition was the only law on the subject. Thus, there were no Indian laws concerning liquor regulation and liquor regulation short of

prohibition has never been a part of tribal government. Compare Williams v. Lee, supra, 358 U.S. at 221-222; Fisher v. District Court (1976) 424 U.S. 382, 386-387. If state licensing laws under § 1161 do not apply, Indians are still bound to conform to other state laws, so to that extent, tribal authority is reduced. Finally, even in the Pala Band of Mission Indians' ordinance permitting liquor traffic on the reservation, such traffic must conform to state laws. (J.A. p. 24.)

Regardless of the historical perspective, however, the policy of allowing Indians to make their own laws and be ruled by them must give way when it conflicts with the authority vested in the states by the Twenty-first Amendment to regulate liquor traffic. Although the view of the early cases that the Twenty-first Amendment allowed the states to act ". . . unfettered by the

commerce clause" (Ziffrin, Inc. v. Reeves, supra, 308 U.S. 132, 138) has given way somewhat, it nevertheless remains a very strong force which will yield only in the most exceptional of circumstances.

For example, when the United States exercises jurisdiction over its real property and instrumentalities such as national parks or military reservations, state liquor laws will not apply. Collins v. Yosemite Park Co., supra, 304 U.S. 518, 538; United States v. Mississippi Tax Comm'n (1973) 412 U.S. 363; United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599.[12/] This is not the case

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12. The citation by the Court of Appeals to this case is puzzling. This court there agreed that the facilities taxed (post exchanges, ship's stores and officer's clubs) were "'arms of the government deemed by it essential for the performance of governmental functions . . .'" (Id. at 606) and therefore immune from state taxation as federal instrumentalities (Id. at 610). This reasoning does not apply to Indian cases. Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 150, 154-55.

here; Congress' power to regulate liquor traffic in Indian country stems from its power over Indian people and their affairs, not their land or instrumentalities.

The Twenty-first Amendment has also yielded when it conflicted with the equal protection clause (Craig v. Boren, supra, 429 U.S. 190, 204-210), the due process clause (Wisconsin v. Constantineau (1971) 400 U.S. 433, 436-437), the Import-Export clause (Dept. of Revenue v. Beam Distilling Co. (1964) 377 U.S. 341, 343-346, and the Sherman Act, enacted under Congress' power under the Commerce Clause (California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97, 106-114).

However, where the authority vested in the states under the Twenty-first Amendment is measured against the right of tribes to govern themselves concerning liquor traffic, the Twenty-first Amendment must

prevail. California v. LaRue, supra, 409 U.S. 109; New York State Liquor Authority v. Bellonia (1981) 452 U.S. 714; Joseph E. Seagram & Sons v. Hostetter (1966) 384 U.S. 35, 42-49; Ziffrin v. Reeves, supra, 308 U.S. 132; State Board of Equalization v. Young's Market Co., supra, 299 U.S. 59. Proper regulation of liquor-related activities are simply beyond the control of tribes. Problems caused by liquor consumption often go well beyond Indian reservations, both geographically and socially, such as sales to non-Indians, drunk driving, alcohol abuse, and criminal activities. Liquor traffic is not like traffic in food or clothes; its regulation requires a much larger perspective than the one which necessarily would be used by a tribe. The Twenty-first Amendment, therefore, should be construed to permit the states to exercise the proper authority over liquor traffic within their borders.

C. Application Of State Liquor Licensing Laws Under The Twenty-First Amendment Is Not Preempted By Federal Law

It has been held that some state laws have not applied in Indian country where the exercise of state authority has been preempted by federal law. White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142. In the cases where preemption has been found, the basis for that finding has been a system of laws, regulations, and federal-tribal relationships which has convinced the Court that there is no room for state laws imposing additional burdens. White Mountain Apache Tribe v. Bracker, supra,; Central Machinery Co. v. Arizona Tax Comm'n (1980) 448 U.S. 160, 163-166; Warren Trading Post v. Tax Comm'n (1965) 380 U.S. 685.

There is no equivalent system with respect to liquor traffic. Certainly the

Indian trader statutes do not provide a sufficient basis for a finding of preemption. Those statutes were enacted at a time when liquor prohibition and Indian country was the rule and clearly are insufficient to provide for regulation of liquor activities. They do not even cover sales to non-Indians. See 25 U.S.C., §§ 261-264. Since prohibition was conditionally lifted in 1953, Congress has not amended any of these statutes to reflect this change. Similarly, regulations promulgated by the Secretary of Interior provide for no regulation over liquor traffic in the same manner that the states or the United States (see 27 U.S.C. §§ 201 et seq.) have. 25 CFR, §§ 251.1 et seq.[13/] Indeed, although nearly 30 years have passed since prohibition in Indian country has been

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13. It should be noted that the punishment provisions for failure to obtain a license applies only to non-Indians. 25 CFR, § 251.3.

repealed, the Secretary has failed to enact any regulations of the kind necessary to properly regulate liquor traffic. Compare 36 CFR, § 5.2 (regulation of liquor traffic in national parks; 27 CFR, subchapter A (permit requirements under the Federal Alcohol Administration Act). The failure of the Secretary to enact such regulations strongly suggests the Secretary holds the belief that the states are ones to regulate liquor traffic. Finally, there has been nothing in the way of a federal-tribal relationship which would suggest that there has been a federal policy to allow tribes to regulate and profit from liquor traffic to the exclusion of the states. Compare White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 149.

This court has said that in an Indian preemption case, although an express congressional statement of preemption is not

required, ". . . any applicable regulatory interest of the State must be given weight (citation omitted) and 'automatic exemptions "as a matter of constitutional law"' are unusual." Id. at 144. In this case, there is no express congressional statement preempting state law; on the contrary, Congress has declared in § 1161 that liquor transactions must conform to state law. So has the applicable tribal ordinance. The area involved is liquor traffic, an area traditionally occupied by the states not the federal government, and specifically reserved to the states by an amendment to the United States Constitution. Application of state law does not stand as an obstacle to the objectives of § 1161. See generally Florida Lime and Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 141-46. Under these circumstances "a clear and manifest purpose of Congress" (Jones v. Rath Packing Co.

(1977) 430 U.S. 519, 525) to preempt should be required before the states' authority is superseded, and no such purpose exists here. Since there is no bar to the exercise of the state's authority under the Twenty-first Amendment, state licensing laws should apply to liquor transactions in Indian country.

* * * * *

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court dismissing the complaint should be affirmed and the decision of the court of appeals, which denied to California the authority to license a tribal member who desires to engage in liquor traffic on a reservation, should be reversed.

Respectfully submitted,

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Attorney General

ALAN S. METH,
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By
ALAN S. METH,
Deputy Attorney General

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

NO. 82-401, October Term 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA REHNER,

Respondent.

CERTIFICATE OF SERVICE

I, Alan S. Meth, the Attorney of record for Baxter Rice, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of December, 1982, I served copies of On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner's Brief on the Merits on the parties thereto, by depositing in the United States mail three copies thereof, with first-class postage prepaid, in an envelope addressed to each attorney of record, as follows:

ART BUNCE
CHARLES SCOTT
GEORGE FORMAN
BRUCE FRIEDMAN
California Indian Legal Services
Post Office Box 2457
Escondido, California 92025

It is further certified that all parties required to be served have been served in accordance with Supreme Court Rule 28.

Alan S. Meth

ALAN S. METH
Deputy Attorney General
Attorney for Petitioner

A-1

HOUSE OF REPRESENTATIVES

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REPORT OF PROCEEDINGS

Hearing held before

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

Subcommittee on Indian Affairs

- - - - -

H. R. 1055

Washington, D. C.

March 18, 1953

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VOLUME I

Pages 1 to 25

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I N D E X

Statement of	Page
Honorable John J. Rhodes, a Representative in the Congress from the State of Arizona	2 (A-8)
Dillon S. Myer, Commissioner, Bureau of Indian Affairs, Department of the Interior	5 (A-13)
Felix S. Cohen, Attorney, San Carlos Apache Tribe of Arizona, Hualapai Tribe of Arizona; General Counsel, The Association on American Indian Affairs	17 (A-32)

H.R. 1055

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WEDNESDAY, MARCH 18, 1953

House of Representatives,
Subcommittee on Indian Affairs of
the Committee on Interior and Insular
Affairs,
Washington, D.C.

The subcommittee met, pursuant to other business, Honorable William H. Harrison (chairman) presiding.

Mr. Harrison. We will take up H.R. 1055, a bill by Mr. Patten, To terminate Federal discriminations against the Indians of Arizona.

The bill will be inserted in the record at this point.

(H.R. 1055 reads as follows:)

83d CONGRESS
1st Session

H. R. 1055

IN THE HOUSE OF REPRESENTATIVES

January 6, 1953

Mr. Patten introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

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A BILL

To terminate Federal discriminations against the Indians of Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, wherever the phrase "Federal laws discriminating against Indians" is used in this Act, the phrase shall be construed to include the following and only the following provisions of law: Revised Statutes,

sections 467 and 2136, 25 United States Code, section 266; Revised Statutes, section 2138, as amended, 18 United States Code, section 1157; Revised Statutes, section 2135, 25 United States Code, section 265; Revised Statutes, section 2139, as amended, 18 United States Code, sections 1154 and 1156; and section 1 of the Act of July 4, 1884 (23 Stat. 94, 25 U.S.C., sec. 195); all of the said laws being laws which forbid the sale, purchase, or possession by Indians of personal property which may be sold, purchased, or possessed by non-Indians.

Sec. 2. That the said Federal laws discriminating against Indians shall not hereafter apply to any act or transaction within the State of Arizona outside an Indian reservation which is in conformity with the laws of Arizona.

Sec. 3. That the said Federal laws discriminating against Indians shall not hereafter apply to any transaction within an Indian reservation in the State of Arizona which is in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation.

Sec. 4. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the Constitution of Arizona, if the people of Arizona shall duly adopt a constitutional amendment repealing the aforesaid paragraphs.

Sec. 5. It shall be the duty of the Secretary of the Interior to cause to be published in the Federal Register any ordinance duly adopted by any Indian tribe or tribes in the State of Arizona which authorizes the sale, purchase, or possession by Indians on that reservation of

personal property which may be sold, purchased, or possessed by non-Indians outside of Indian reservations.

Mr. Harrison. We will ask Mr. Rhodes from Arizona if he will explain the bill.

STATEMENT OF HONORABLE JOHN J. RHODES, A REPRESENTATIVE IN THE CONGRESS FROM THE STATE OF ARIZONA

Mr. Rhodes. Mr. Chairman, before I proceed, I would like to ask if Mr. Patten was notified that the bill would be coming up for hearing and given the opportunity to attend.

Mr. Harrison. I assure you he was, Mr. Rhodes.

Mr. Rhodes. Thank you very much. I just wanted that to show on the record.

This bill was introduced by my colleague from Arizona, Mr. Patten, to terminate Federal discrimination against the Indians of Arizona. There are certain laws, which it is felt by the author of the

bill and by me, that are very discriminatory and are unnecessary insofar as the operation of the Indian population of the State of Arizona is concerned.

One of these bills has to do with the sale of liquor to Indians. I know that that is a very controversial subject.

I do know, however, of my own knowledge that every responsible person who has dealt with the Indians of Arizona believes that the continued prohibition of the sale of legal liquor to these Indians is detrimental to the Indians. You have a situation where an Indian, if he desires to have a drink of liquor, has to pay any number of prices for the liquor, or he has to make it himself; and some of the potions which come out of these tribal stills are rather amazing in their permanent effect on the individual.

Further, the Indian, when he buys a bit of liquor, is almost in the same situation that perhaps a few other people were in during the days of prohibition when, as soon as the bottle came into one's hands, it was immediately consumed before somebody came around and took it away. And the result has been drunkenness among the Indians, which is I think almost directly caused by the existence of this particular law.

I believe it would be very harmful to the Indian population to have it continued.

The other provisions of the bill are almost identical with the bill of Mr. D'Ewart which is not before the committee for consideration, and if Mr. D'Ewart's bill is passed as it is now written, without amendment striking out the various statutes involved in there, it would take care of the Patten Bill except for one

instance, which also has to do with the liquor situation.

When the State of Arizona was admitted to the Union, the enabling legislation provided there would be included in the Constitution a provision that no sale of liquor would be made to an Indian; and the further provision that in the event that any Indian land was sold, for 25 years thereafter no liquor would be sold on that particular land. Those provisions are now in the Constitution of Arizona, and they cannot be removed without an Act of Congress which authorizes the removal thereof.

This would, in effect, amend the enabling act of the State of Arizona to allow the State to amend its Constitution to remove these provisions which we believe are completely discriminatory.

Mr. D'Ewart. Would you yield there?

Mr. Rhodes. Yes, I would.

Mr. D'Ewart. Would you object to amending this bill to strike out the reference to the State of Arizona except in section 4, which has to do with the enabling act?

Mr. Rhodes. I would not. I would be very happy to accept that amendment.

That is the sum of my presentation, Mr. Chairman, unless there are questions.

Mr. Harrison. Any questions of Mr. Rhodes?

Mr. Myer, do you want to make any statement on H.R. 1055?

Mr. Myer. I would be glad to, Mr. Chairman.

Mr. Harrison. I thought I recalled a report, but I do not see one now.

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Mr. Myer. I thought I gave you a copy. I have my copy here, but I thought I gave you the extra copy.

Mr. Harrison. Yes, here it is. I found it.

STATEMENT OF DILLON S. MYER, COMMISSIONER, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Myer. Mr. Chairman, again I would like to state my report has not cleared through the channels and has not been approved by the Bureau of the Budget as yet.

Mr. Harrison. The report will be made a part of the record.

(The report referred to is as follows:)

Mr. Myer. I recommend that the bill be enacted if its title and text are

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amended to conform to the enclosed draft, which I will present to you a little later.

There are six statutes that are defined in section 1 of the bill as "federal laws discriminating against Indians.

"Two of the statutes, 18 U.S.C.A. 1154 and 1156, relate to the sales of intoxicants to Indians, and the introduction and possession of intoxicants in the Indian country. Two of the statutes, 25 U.S.C. 265 and 266, relate to the purchase or pledge from an Indian within the Indian country of articles used in hunting, implements of husbandry, cooking utensils and clothing, and the sale of arms or ammunition in country occupied by hositle or uncivilized Indians. Two of the statutes, 25 U.S.C. 195 and 18 U.S.C.A. 1157, relate to the sale or disposition of livestock issued to or

purchased for Indians by the United States."

Now, without reading further, may I summarize our position on the bill, and then I would like to read into the record out proposed redraft covering these points.

We are completely in agreement that the statutes relating to intoxicating liquors in Indian country should be eliminated as discriminatory. This bill, unfortunately, does not cover all the statues, so that our redraft would include these two, plus additional paragraphs that we feel should be revised.

Secondly, we are in thorough agreement, and our redraft will so indicate, that the statutes 25 U.S.C. 265 and 266 should be withdrawn from the statute books.

Thirdly, we have the same argument with the item regarding disposition of

livestock which we discussed the other day in relation to Mr. D'Ewart's bill on 18 U.S.C. (a) 1157, which we would like to have eliminated from this bill at this time, at least until further study can be made of it, for the simple reason that it does have to do with not only the supervision of trust property, which is livestock held in trust, it does affect to some extent loans and credit operations that have been carried on in the past in regard to these properties. It has enforcement clauses in the bill which, if eliminated, we believe would weaken our position from the standpoint of the management of those properties.

May I hurry on to say that we are trying very hard, and making quite a little progress, I think, to get out of the business of having cattle held in trust. We think we should do so. And, of course,

if they were not in trust, this bill would not affect them anyhow.

What 1157 briefly does, as was read into the record the other day, it provides that any property held in trust cannot be sold without the approval of the superintendent, and if it is sold, it makes both the seller and the buyer liable.

Now with that general comment, I would like to read into the record, Mr. Chairman, a rather simple version of the kind of bill that would cover all of these points, I believe.

Title -- "To eliminate certain discriminatory legislation against Indians in the United States."

I forgot to mention that we would like to broaden the bill to cover the whole country, and this title would so indicate.

"Be it enacted by the Senate and House of Representatives of the United

States of America in Congress assembled, that Chapter 53 of Title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding Section 1151 of such title the following new item:

"'1163. Application of Indian liquor laws.'

"Section 2 Title 18, United States Code, is hereby further amended by inserting in Chapter 53 thereof immediately after Section 1162 a new section, to be designated as Section 1163, as follows:

"'1163. Application of Indian liquor laws.

"'The provisions of Sections 1154, 1155, 1156, 3113, 3488, and 3618 of this Title, and the provisions of Section 2141 of the Revised Statutes (25 U.S.C., sec. 251), shall not apply within any area that is not Indian country, nor to any act or

transaction within any area of Indian country over which the State lacks full criminal jurisdiction that is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.'

"Section 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New Mexico shall adopt constitutional amendments to accomplish such repeal.

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"Section 4. Section 2135, Revised Statutes, 25 United States Code, section 265, is hereby repealed.

"Section 5. Sections 467 and 2136, Revised Statutes, 25 United States Code, section 266, are hereby repealed.

"Section 6. Section 1 of the Act of July 4, 1884 (23 Stat. 94, 25 U.S.C. 195) is hereby repealed."

That ends the proposed bill.

Mr. Rhodes. Mr. Chairman, might I ask that copies of that be made available to the Members of the committee?

Mr. Harrison. I think that would be well to have the staff make copies so the Members of the committee would have the proposed substitution to the bill.

The author of the bill is here now. Mr. Patten, would you like to make a statement on the bill?

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Mr. D'Ewart. I wonder if it would be a good idea to have this explanation, and then Mr. Patten's comments.

Mr. Patten. I would like to hear this too.

Mr. Harrison. Go ahead, Mr. Myer.

Mr. Myer. I think it is probably rather clear -- I have already stated what we would propose to do in this bill, but I did want to comment on this rather long section 2.

What it does is to eliminate, I believe, all the statutes regarding prohibition on the use of liquor whether on Indian country or outside, and provide for tribal ordinances in case they do not want liquor on the reservation areas, where the state laws do not apply.

I think it is a pretty thorough job of going into the whole liquor question to eliminate those provisions we are trying

and would like to have eliminated as far as we are concerned.

Now the rest of them go to the points we have already covered.

As I remember, the number section here is simply a matter of codification to get things in line so we could do this job.

The other sections have to do with the repeal, as was proposed in the original bill, of sections 265 and 266 and 195.

I think that is all I have to say, Mr. Chairman.

Mr. Haley. Mr. Chairman?

Mr. Harrison. Mr. Haley.

Mr. Haley. You referred particularly to just two States who would have to amend their constitution.

Mr. Myer. I intended to mention that. It so happens that both Arizona and New Mexico passed their constitutions later than some of the other States, and as far

as I know, they are the only two States that have provisions of this kind in their constitution. That was done pursuant to Federal law and, I believe, to provisions that authorized the State to be established. So that is the reason why these two States are mentioned.

Mr. Haley. And that is the only two?

Mr. Myer. The only two to our knowledge. I think both of them developed their constitution and became States, as I remember it, in 1912, and both of them did have provisions in their constitutions pursuant to the general pattern of the U.S. laws, and this would give them authority as far as the United States is concerned to change them if they wish to do so.

Mr. Shuford. Mr. Chairman?

Mr. Harrison. Mr. Shuford.

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Mr. Shuford. Would it not be wise to put in the bill "or any other State that has such a provision"?

Mr. Myer. I certainly would have no objection to that and would be very happy to agree to such a proposal.

Mr. Harrison. Mr. D'Ewart.

Mr. D'Ewart. I have a question as to the applicability of the repeal of Indian liquor laws. It says "shall not apply within any area that is not Indian country."

You know Indian country is defined as within the boundaries of reservations. You say "shall not apply within any area that is not Indian country". That means shall not apply, this repeal of Indian liquor laws, to all of the United States outside the boundary of an Indian Reservation. Is that what you want to do?

Mr. Myer. No, that is not what is intended, I believe.

Mr. D'Ewart. (Reading) "Shall not apply within any area that is not Indian country."

Mr. Myer. Well, the reason I believe that is in here -- and I am a little lame here, and I will have to admit that I may have to double check for you -- I believe that this has to do with the fact that the Indian liquor laws generally do apply to Indian country, and I think that we are trying to avoid affecting anything that relates to statutes that might affect this general pattern.

Now, Mr. D'Ewart, I would prefer to check this matter with the gentleman who wrote this bill a little further, if you do not mind.

Mr. D'Ewart. Because it is against the law to sell an Indian liquor in

the District of Columbia under Federal Statutes.

Mr. Haley. I think it is also true in the State of Florida.

Mr. Shuford. Do you not think this should provide in there it would not affect any of the statutes of the individual States?

Mr. Myer. We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided.

I have been informed -- and I did not see this report until last night, and it was rather late when I read it, and I did not have much time this morning, and I did not raise that question -- but I have been advised that this report is intended to eliminate all of the sections in the statutes which discriminate against Indians and at the same time not interfere with

State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law.

Mr. Rhodes. Mr. Chairman?

Mr. Harrison. Mr. Rhodes.

Mr. Rhodes. You did not have anything in your bill concerning the sale of cattle, did you, Mr. Myer?

Mr. Myer. I proposed that we eliminate from this bill section 1157, which was discussed at some length the other day, in connection with a similar bill that Mr. D'Ewart had.

Mr. Rhodes. As I recall, you were going to get a policy determination from the Department on that.

Mr. Myer. That is right. We have reviewed that matter quite thoroughly, and we find there is still quite a large number

of cattle owned in trust, and also there are many loan agreements in effect at the present time which might be affected if this law was repealed, on trust cattle in this stage in the game.

I have already reported to Mr. D'Ewart earlier this morning if 1157 were to be left in, we would like time, at least which I have not had, to prepare a proposed amendment that would eliminate its effect upon the present loan agreements and give a period of time as regarding any trust cattle that are now trust cattle, where we can work out a program of gradual adjustment with those poeple.

It will be a little intricate to work out, but I think it can be done.

I did not get the summary memorandum -- again, I read it last night and was able to talk to Mr. Huber only briefly about it this morning.

Mr. Rhodes. I take it, then, your position, whereas it was unofficial before, is now the Departmental position on this?

Mr. Myer. I frankly have not discussed this further with the Department. I was simply going to get further information as to the possible volume of trust cattle, and how it would affect it, as I remember it. I did not discuss this bill with the Departmental officials. I did ask them to review two other bills important here, and I was notable to get their final answer on it before I came up here this morning.

Mr. Rhodes. Then this is --

Mr. Myer. This is still an unofficial report on this bill.

Mr. Rhodes. Do you expect to get an official policy from the Department on this matter?

Mr. Myer. This report will be reviewed by the Department and by the Bureau of the Budget before it comes to you officially yes. It will have to be. This is the normal process, and it is to be for the Department at the present time.

Mr. Harrison. Mr. Patten.

Mr. Patten. Mr. Commissioner, is it not a fact that you are overlooking one thing? Under the present statutes an Indian cannot go off the reservation and, even though he has the ability to run cattle or farm land, lease land individually by himself.

Mr. Myer. Sure he can.

Mr. Patten. That is one angle to your question I think you overlooked. I think we would be in agreement if you could sustain your present loan agreements and allow him to go off the reservation.

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Mr. Myer. An Indian can go anyplace he wants to go. We are not making credit loans out of our revolving loan funds all over the United States because it would be impossible to administer. But that is the only reason. There is no limitation on the Indians going off the reservation, setting up in the cattle business and getting credit from the banker whereever he can get it. But there is no provision in our credit setup for supervising credits scattered out away from the reservation, because it is too costly a process for us to administer.

Mr. Patten. Is there not a Federal statute that you cannot buy cattle from Indians?

Mr. Myer. None that I know of, sir.

Mr. Patten. That is what we are trying to repeal, is it not, 1157?

Mr. Myer. I think you will find 1157, which was read into the record the other day -- and I will be glad to read it again if you wish to have me do so -- simply provides that if the cattle are, as are many Indian lands, it would require the authorization of the superintendent to sell them.

Mr. Harrison. I understand Mr. Cohen has a statement he would like to make on this bill, H.R. 1055. Mr. Cohen.

STATEMENT OF FELIX S. COHEN, ATTORNEY, SAN CARLOS APACHE TRIBE OF ARIZONA, HUALAPAI TRIBE OF ARIZONA; GENERAL COUNSEL, THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Mr. Cohen. Mr. Chairman, my name is Felix S. Cohen, and I appear here as attorney for the San Carlos Apache Tribe of Arizona and for the Hualapai Tribe of Arizona and also as General Counsel for the

Association on American Indian Affairs, of which Mr. Oliver La Forge of Santa Fe, New Mexico, is chairman. And I appear in support of H.R. 1055.

May I call the committee's attention, in the first place, to the fact that an identical bill was before this committee and is reported in the Congressional Record of May 8, 1952. In that report the following statement appears:

"Representative Patten, who introduced the three measures in the House, explained their objectives. Other witnesses who testified on behalf of the proposed legislation were Thomas C. Segundo, Chairman, Intertribal Council, Arizona; Clarence Wesley, Chairman, and Jess Stevens, Vice Chairman, both of the San Carlos Apache Tribal Council; Royal Marks, Arizona attorney; Felix Cohen, attorney,

Washington, D.C.; and I. W. Flood, business agent, Salt Riva Pima, Maricopa County, Arizona."

So far as I know, the tribes of Arizona which have joined in the Intertribal Council of Arizona are unanimously in support of this bill.

The Association on American Indian Affairs has testified in support of this bill and, I believe, has sent a telegram to the Chairman within the last day or two in support of this bill.

I should say that the Association on American Indian --

Mr. D'Ewart. Did you say it would also meet with the requirements of the requests of the Blackfeet?

Mr. Cohen. We are talking here about the Arizona bill, but certainly the Blackfeet Tribe and, I believe, all the tribes of Montana, the Intertribal Policy

Board have expressed themselves in support of this legislation, and also the Montana Legislature in House Joint Memorial No. 5, passed, I think, about two years ago, has gone on record in support of this legislation.

I think in view of the statements that have been made this morning there is no need to argue about the principles involved. I think we are all in favor of the principles of this legislation, and I think basically there is no substantial difference in purpose between the Members of the committee here, the Indians, and the Indian Bureau.

There are differences, however, in the scope and phrasiology (sic) of the legislation and in the question whether this legislation should be adopted as a whole or whether it should be broken into

pieces, perhaps, and some parts of it left for other consideration.

Now perhaps the most serious point of difference is in connection with the matter of the sale of cattle. The Indians feel that is a very serious discrimination, not only as a matter of principle, but an interference with their business, and many Indians are in the cattle business. It is their chief business. And they feel it is a very serious interference with their free enterprise and with their cattle business to have to go to the Indian superintendent for permission any time they sell a cow or a horse or a pony, even though the livestock is not trust livestock, even though they have paid back to the Government every dollar of any loan mortgage they may have borrowed from the Government on that livestock.

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If, as Comissioner Myer suggested, this bill, as he believes, were limited to trust property, I do not believe any of the Indians that I represent would object to it, but the law as it now stands is not limited to trust property.

The law as it now stands says very definitely: "Where restricted Indians" -- that is a technical word. It ordinarily means an Indian with an inalienable allotment of land. But a restricted Indian may have unrestricted property. The money in his pocket and the horses and cows and furniture in his house may be unrestricted.

"Where restricted Indians are in position or control of livestock, purchased for or issued to them by the Government.

Let me explain that phrase. In the old days Indian money was generally held by the superintendent and spent for the Indian by the superintendent. The

superintendent would go out and buy a team of horses or some breeding stock and turn it over to the indian. It does not mean that this is Government property. It does not mean that the government ever had any lien or mortgage over the property. It just means as a matter of doing business the superintendent went out and bought the livestock for the Indians.

Now it says, "Where restricted Indians are in possession or control of livestock, purchased for or issued to them by the Government, or the increase therefrom" -- and I take it that means down unto the seventh generation. I take it the Government pays the Navajo Indians under its obligation to the Navajo Indians under the early treaty, in the form of sheep, can still say that the increase of those sheep -- 7 or 800,000, I believe, now on the Navajo Reservation -- are the increase of

livestock which were purchased for or issued to Indians by the Government. The Indians do not owe the Government anything on those sheep, they belong to the Indians. But I believe as the statute reads, and as it is interpreted, they come under the statute. And the statute says that as to such livestock "or the increase therefrom, shall not be sold, transferred, mortgaged, or otherwise disposed of except with the consent in writing of the superintendent or other officer in charge of the tribe."

And then it goes on to say not only may it not be sold, but such livestock may not even be removed from the reservation.

The man who wants to drive his team off the Papago Reservation to a water hole on the outside, if the ancestors of that team were Government issue or purchased by the Government out of Indian

funds, may not do so, as I read the statute, without the permission of the superintendent.

Now I do not say that statute is enforced to the hilt today. Certainly, like some of the other statutes referred to in this bill -- the ammunition statute and the statute which makes it a crime or an offense for a white man to buy clothing or implements from an Indian -- those things are not fully enforced. But there is enough uncertainty in the air and there is enough difficulty and possibility of enforcement so that the Indian who is in the cattle business operates under a peculiar and unjustifiable paternalistic restriction, and we think, therefore, at least speaking for the Indians that I represent, that this restriction is just as unjustified as the restriction on the

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purchase of ammunition or the sale of clothing or the sale of liquor.

Now one minor point in connection with the proposed revision of the provisions dealing with liquor, suggested by Commissioner Myer. I certainly have no objection to Commissioner Myer's suggestion that the provisions be amplified so that all of the liquor provisions are included, but I do have some serious question not as to purpose but as to phrasiology (sic) with respect to section 1155, which the Commissioner suggests should be added to the bills that this bill would repeal.

That refers to intoxicants dispensed on school sites, and it says, "Whoever on any tract of land in former Indian country, upon which is located any Indian school maintained by or under the supervision of the United States, manufactures, sells, gives away, or in any

manner or by any means furnishes to anyone, either for himelf or for another, any vinus, spirituous, malt fermented liquor" and so on.

I have some serious question as to whether school property should be subjected, so far as the Federal Government is concerned, to the sale of liquor.

Now the Commissioner may very well say that should be covered by State law, and perhaps it is. On the other hand, when a matter of this sort comes up on the Floor of Congress for discussion and somebody asks the sponsor of the bill, "Does this as far as the Federal Government concerned legalize the sale of liquor in Indian schools?" I think the sponsor would have to say yes.

I would prefer not to see that provision not covered in this bill.

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I do not think it is a matter of discriminating against Indians because this does not discriminate against Indians, this merely says a certain type of property, a particular kind of federal school property shall not be used for the sale of liquor or the manufacture of liquor. And there are similar statutes, ordinances, elsewhere, which apply equally to the Indian and white man.

I should like to say, by way of correction of one of the statements that was made earlier, that section 1154, which is the main Indian liquor statute at the present time, although it has the title "Intoxicants dispensed in Indian country" is not limited to Indian country. That title is definitely misleading.

As Congressman D'Ewart very properly pointed, the present statute, section 1154, not only forbids the

dispensing of liquor in Indian country but also forbids the sale or giving away of liquor and various other kinds of specified products to any Indian to whom an allotment of land has been made, and so on, regardless of the place where that is done. And that seems to me to be most important of the current discrimination.

As I say, I do not think there is any real difficulty on principle here. It may be that the committee will want to work out in executive session the exact language of the provisions which would accomplish what we all have in mind there.

If there are any questions as to the bill or as to the position of the groups I represent, I will be glad to answer them.

Mr. Harrison. Do any Members of the committee have any questions they would like to ask Mr. Cohen?

Thank you, Mr. Cohen.

Mr. Cohen is the last witness who requested time on this particular bill. If there are no objections, I am going to ask that the sponsor of the bill get together with the Commissioner and see whether you can iron out the difficulties and return the bill to the committee for further action tomorrow morning, if possible.

Mr. Myer. May I take one moment to make a brief comment regarding the testimony of Mr. Cohen?

Mr. Harrison. If you make it very brief. I do not want to shut you off.

Mr. Myer. It will be very brief, I assure you.

First of all, on the comments regarding 1157, we have interpreted the restriction to mean property held in trusts, and I assure you that there is no intent on the part of the Indian Bureau or

the Department of Interior to construe that as literally as Mr. Cohen in his bloodcurdling statement as to what we might do, intended to do.

Now I want to repeat, as far as 1157 is concerned, we would be very glad, if you want to take the time to work it out, to see if we can work out a provision that would safeguard the loan agreements now in effect and the trust cattle now in effect and remove the word "revision" and all the rest of the section. That is number 1.

Number 2. I have no intention of recommending to this committee that we do the kind of job that will provide for sale of liquor on Indian school property, and I think Mr. Cohen knows that, and I think you know that. All we are trying to do is to try to clean up all the statutes, which I thought was what he wanted to do, that

have to do with Indians as versus other people in the United States. And that section is one of those that would have to do with that.

I have no objection if the committee sees fit to eliminate that particular statute from the provisions of the recommended bill that we have on the record.

Mr. Harrison. Thank you, Mr. Commissioner.

I would like to ask the indulgence of the Members of this committee to meet here tomorrow morning at a quarter of ten, rather than ten o'clock, for an executive session for 30 minutes on bills which we have discussed. At 10:15 H.R. 130 will be the first order of business, followed by H.R. 2231, H.R. 2976, H.R. 1383, if we can reach it. Those which are not reached tomorrow will be carried over until later.

A-48

HOUSE OF REPRESENTATIVES

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REPORT OF PROCEEDINGS

Hearing held before

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

Subcommittee on Indian Affairs

- - - -

H. R. 1055

Washington, D. C.
May 6, 1953

VOLUME I

Pages 1 to 9

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A-49

H. R. 1055

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WEDNESDAY, MAY 6, 1953

House of Representatives,
Subcommittee on Indian Affairs
of the Committee on Interior and
Insular Affairs,
Washington, D. C.

The subcommittee met at 10:15 a.m., pursuant to call, in the Committee Room, New House Office Building, Honorable Wesley A. D'Ewart presiding.

Mr. D'Ewart. The Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee will please come to order for the consideration first of H. R. 1055 by Mr. Patten, To terminate Federal discrimination against the Indians of Arizona.

Hearings have been held on this bill, witnesses have been heard, it is the intention of this committee to act as

though we were in executive session to take such action as the committee desires.

(H. R. 1055 is as follows:)

[Bill omitted in printing, see page A-3.]

Mr. D'Ewart. Mr. Rhodes, would you care to make a statement on this?

Mr. Rhodes. Mr. Chairman, of course, I made a statement when the bill was before the committee before. As the committee will recall, we reported out a bill which was introduced by the acting chairman which, I think, embodied part of the subject of the Patten Bill, and I do not know just right off hand which sections should be deleted. But the Patten Bill should be amended to strike out those sections which have been taken care of in the D'Ewart Bill, I would imagine.

For instance, we have in the Patten Bill various sections involving the sale of cattle and discrimination against Indians in the sale of personal property which were taken care of in the D'Ewart Bill.

Mr. D'Ewart. I have a report in my hand, not dated, not signed. So I take it

that is unofficial?

Mr. Sellery. Unofficial, yes, sir.

Mr. D'Ewart. (Reading) "I recommend that the bill be enacted if its title and text are amended to conform to the enclosed draft".

I have not seen the draft. Maybe we should have this report read to the committee. That is an unofficial report.

The Clerk. (Reading) "My dear Mr. Miller:

"Reference is made to your request for a report on H. R. 1055, a bill 'To terminate Federal discriminations against the Indians of Arizona'.

"I recommend that the bill be enacted if its title and text are amended to conform to the enclosed draft.

"Six statutes are defined in section 1 of the bill as 'Federal laws discriminating against Indians'. Two of the statutes, 18

U.S.C.A. 1154 and 1156, relate to the sales of intoxicants to Indians, and the introduction and possession of intoxicants in the Indian country. Two of the statutes, 25 U.S.C. 265 and 266, relate to the purchase or pledge from an Indian within the Indian country of articles used in hunting, implements of husbandry, cooking utensils and clothing, and the sale of arms or ammunition in country occupied by hostile or uncivilized Indians. Two of the statutes, 25 U.S.C. 195 and 18 U.S.C.A. 1157, relate to the sale or disposition of livestock issued to or purchased for Indians by the United States.

"I consider the laws which prohibit the sales of intoxicants to Indians as discriminatory but I believe these laws should be made inapplicable to transactions occurring outside of Indian country generally rather than only in Arizona. I

also believe that the laws should be made inapplicable to transactions occurring within the Indian country generally rather than only in Arizona if such transactions are in conformity with the ordinances of the tribes concerned and are not contrary to state law. In addition, there are statutes on the subject other than those contained in H. R. 1055. The enclosed draft includes these additional statutes and would make the bill of general application rather than restricting it to the State of Arizona.

"For many years there has been no need for the protection to both Indians and non-Indians which the statutes codified as 25 U.S.C. 265 and 266 were designed to afford. There are no longer any Indians or Indian tribes which are considered as uncivilized or hostile in the sense in which these words are used. The statutes,

therefore, are obsolete and, while I believe they should be repealed, I also believe the repeal should be general rather than restricted to Arizona. The enclosed draft would accomplish that general repeal.

"I do not believe that the statutes codified in 25 U.S.C. 195 and 18 U.S.C. 1157 should be construed as discriminatory against Indians. These sections prohibit the sale or other disposition of livestock purchased for or issued to Indians by the Federal Government, except with the consent in writing of the superintendent or other officer in charge of the tribe to which the owner or possessor of such livestock belongs. The latter statute also requires that such livestock be branded with the 'ID' or reservation brand of the jurisdiction to which the owners of such stock belong.

"Title to the livestock to which these statutes refer is in the United States in trust for the Indian. Trust title is a privilege accorded Indians to assist in their economic development which exempts property so held from State taxation. Trust title to such property is not a mechanism for policing or restricting activities of Indians. In order to retain the privilege of holding title to livestock in trust, the owner is required to brand the stock 'ID' and to obtain permits to sell before disposing of the same. These are obligations which the Indians assume for the privilege of holding the stock in a trust status.

"Any Indian in possession of trust livestock against which there are no liens may request the superintendent to release the interests of the United States in such stock at any time, and superintendents are

under instructions to comply with such requests. Superintendents have also been instructed that Indians in possession of trust livestock against which there are no liens, who refuse to brand their stock "ID" or to obtain permits to sell, shall be given unrestricted title to such property. Employees of the Bureau of Indian Affairs have been instructed that Indians shall not be permitted to retain the privilege of having title to their livestock in trust, unless they conform to the requirements of branding and of obtaining permits to sell."

(The report in full is as follows:)

[Report of Secretary of Interior and Amendments Omitted]

Mr. Rhodes. Mr. Chairman, in order to save the time of the committee and obviate the necessity of reading this long report, it obviously will call for further extensive amendments to this act. Mr. Patten, the sponsor of the bill, is not in the city at the time, and I would prefer to have a copy of the report and take the matter up with Mr. Patten, then present amendments to the committee at a later date.

Mr. D'Ewart. I have a letter here dated May 6 addressed to Honorable William H. Harrison, Chairman, Subcommittee on Interior and Insular Affairs, Room 1324, New House Office Building, Washington, D. C. It is signed by A. B. Sieh, Secretary to Harold A. Patten, Member of Congress. It reads:

"My dear Mr. Harrison:

"Mr. Patten, who is detained in his

District on business, has requested that I, in his absence, submit the following telegram to be included in the record pertaining to hearings being held on H. R. 1055 to terminate Federal discrimination against the Indians of Arizona.

The telegram is as follows: 'Navajo Tribe united behind anti-discrimination bill passed by House yesterday provided measure repeals Indian prohibition. We understand bill as acted on by House may have eliminated liquor clause. Navajos believe equal rights also entitles us to legal glass of beer and we will oppose any anti-discrimination measure which does not face up realistically to liquor question. Appreciate latest information and your advice.

"'Sam Ahkeah, Chairman Navajo Tribal Council.'"

Now I might say that the "ID" concerning livestock was taken care of in former legislation, and I believe those provisions do not need to be considered at this time. That bill has passed the House and gone on. The only thing we are concerned with this morning is the liquor features of this bill.

Mr. Rhodes. Is there anything in the report concerning the liquor features?

Mr. D'Ewart. It was just handed to me a minute ago.

Mr. Sellery. The fourth paragraph of the unofficial report.

Mr. Aspinall. Off the record.

(Discussion was had outside the record.)

Mr. D'Ewart. On the record. H. R. 1055 will be considered as read and open for amendment.

Mr. Rhodes. Mr. Chairman, I have one

amendment I would like to offer, which is a subject a bit new. It refers to the Crow Tribe, and I would like to ask that the clerk read this amendment.

Mr. D'Ewart. The particular provision to which you refer is found in section 9 of the Act of June 4, 1920, an Act to provide for allotment of lands of Crow Tribe, and the particular provision of section 9 which is proposed to repeal reads as follows:

"Land within said reservation, whether allotted, unallotted or otherwise disposed of, shall be subject to all of the laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country unless otherwise provided by Congress."

That particular section provides only to the Crow Tribe, and if we do the job we hope to do, it will be repealed along with the other.

Mr. Westland. Federal law?

Mr. D'Ewart. Federal statute.

Mr. Rhodes. Do you have the citation, the U. S. Code?

Mr. D'Ewart. 41 Statute U.S.1.

Mr. Rhodes. What about the U. S. Code? The reason I ask, we have a draft of a bill here which includes sections of the Code which were not in the Patten Bill and not in your bill.

Mr. Aspinall. Off the record.

(Discussion was had outside the record.)

Mr. Aspinall. I make the motion.

Mr. Rhodes. Second.

Mr. D'Ewart. It has been moved and seconded that H. R. 1055 be reported favorably to the full committee with such amendments as are found necessary to carry out the intent of the committee. All those in favor say aye.

Opposed, no?

It is so ordered.

(Whereupon, the subcommittee moved to other business.)

A-64

HOUSE OF REPRESENTATIVES

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REPORT OF PROCEEDINGS

Hearing held before

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

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H. R. 1055

Washington, D. C.

June 2, 1953

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VOLUME I

Pages 1 to 8

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I N D E X

Statement of — Page

Honorable Harold A. Patten, a Representative in Congress from the State of Arizona — 2

H. R. 1055

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TUESDAY, JUNE 2, 1953

House of Representatives,
Committee on Interior and Insular Affairs,
Washington, D. C.

The committee met, pursuant to other business, Honorable A. L. Miller (chairman) presiding.

Chairman Miller. The next bill for consideration is H. R. 1055, To terminate Federal discrimination against the Indians of Arizona. The bill is authored by Mr. Patten.

(H. R. 1055 is as follows:)

[Bill omitted in printing, see page A-3.]

Chairman Miller. I believe Mr. Harrison of Wyoming handled the legislation.

Mr. Harrison. I was not here at the final hearing, Mr. Chairman. Mr. D'Ewart or Mr. Berry handled it.

Mr. Berry. Mr. D'Ewart.

Mr. Harrison. But Mr. Patten is in the room.

It is the feeling of the committee, however, that this bill should be reported out for possible action by the House to see whether or not it could be acted on favorably. And these amendments you have before you on your desk were adopted to try to help the bill. Mr. Patten is here if you would like to ask him any questions about it.

Chairman Miller. Mr. Patten, our colleague from Arizona. Have you any

comments on the particular amendments the committee adopted?

STATEMENT OF HONORABLE HAROLD A. PATTEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. Patten. Mr. Chairman and members of the committee:

Of course, I just saw the amendments this morning.

I like the amendment particularly to change the title and eliminate Arizona and make it the Indians of the United States.

Mr. Abbott of the subcommittee staff, I believe, worked these amendments out with three thoughts in mind, which I believe are good.

One is to eliminate any elimination (sic) of the liquor being sold on or near a school ground, which I think, while that

actually does not apply because if this bill were passed to remove all discrimination, the Indians would still have to comply with the State law in every regard--but I am afraid you would build up a barrier in that people could get the false impression.

The other is the fact, if I understand, it does not eliminate the discrimination of prohibiting Indians from operating distilleries. As you know, that is the biggest objection to the liquor prohibition against Indians. Of course, I was a little surprised to find out the law enforcement agencies the sheriff, the city police, and all adjoining towns to the Indian reservations in Arizona, supported the elimination of the liquor restriction, because they know of the great harm the Indians do to themselves and to the community, particularly, in making raisin jack. As I told you, the largest purchases of Sunmaid

Raisins in the Southwest are the Indian trading posts. And they take that and make And they take that and make raisin jack, some of it highly impure. And that causes most of our difficulties. So I think distillation, if I understand the bill, is still in there.

Mr. Dawson. Could I ask a question?

Chairman Miller. Mr. Dawson.

Mr. Dawson. Who proposed these amendments? And do we have a Department report on the bill?

Mr. Rhodes. There was a Department report on the bill, and the amendments as they are now are substantially as proposed by the Department. Counsel for the committee, Mr. Abbott, actually worked out the wording, and I assisted him on certain points of it.

The sections which are now in the amendments which were not in the original

bill are 3113, 3488 and 3618. Those are merely refinements to clean up the record.

In other words, section 3113 provided for search and seizure in the event of suspected liquor. Setion 3488 provides for confiscation of vehicles which are used to transport liquor. Section 3618 is the general enforcement provision.

If this bill passes, of course, there is no reason for those enforcement provisions as they apply to Indian country. So it was felt, rather than leave them in the law, which might act as a confusing element, that the whole thing should be cleaned up at once.

Mr. Dawson. What is the reason for limiting this bill to discrimination against the Indians in Arizona?

Mr. Patten. Of course, that was my interest in trying to get that, because it requires the permission of the United

States Government. As you know, section 3 permits the State of Arizona, by their own action and by election, to amend their constitution.

Mr. Rhodes. If the gentlemen will yield, you will note, Mr. Dawson, on the line of the amendments, this title is taken care of. Amend the title to read: "to eliminate certain discriminatory legislation against Indians in the United States."

Mr. Engle. As amended, the title applies to all Indians?

Mr. Rhodes. That is correct.

Mr. Engle. That makes it all right with me.

Mr. Patten. As I understood the thinking of the subcommittee the D'Ewart Bill, as they passed it out, removed all discriminations with the exception of those against liquor transportation, possession

and consumption. This bill would specifically point up those issues and allow the Congress or this committee, however it shall, to decide on those points.

The State of Arizona in its constitution in two regards prohibits the Indians certain activities. Of course, we have the problem that all treaties with Indians prohibit their use of firearms and purchase of ammunition, and the sale and consumption of liquor. I think it takes a specific Act of Congress in order to abrogate those provisions defined in the treaty. And then I should imagine it would take action on the part of the tribal council to accept it if we rewrite the treaty in that regard.

Mr. Engle. If the gentleman will yield, in California recently our Legislature repealed the law that prevents the

sale of liquor to Indians, and the Federal people went out and nevertheless insisted on enforcement of those provisions which existed in Federal law. A great deal of confusion has arisen from the fact that the State withdrew their prohibition and the Federal prohibition still exists.

I made a check on the situation to see whether or not Federal regulations would apply exclusively upon Indian territory, and much to my surprise I found out that Federal law is broad enough so that you could hardly sell liquor to an Indian Indian anywhere and be safe, whether it was on a reservation or not.

This provision has caused a lot of dissention and hard feeling. These Indians are drafted into the Service and go over to Korea and get shot at, and they cannot come back and walk into a bar. They consider it an abridgment of their citizenship which is

which is wholly inconsistent with the obligations of citizenship which have been imposed upon them under the draft law and which they have freely accepted as an obligation of patriotism to their country. If we are going to continue to ask these Indians to bear arms for the country, we simply have to remove these kinds of discriminatory provisions.

I am certainly in favor of it, and I will support the gentleman on the floor. I hope the bill will be amended so it is broad enough to wipe them all out everywhere, at least in my State and his, and put these Indians in the same position wiuth reference to going into a bar that they are with reference to going on to the battlefield.

Mr. Patten. It is interesting to note that New Mexico has removed their restrictions also, and the Legislature of Arizona

has memoralized Congress asking they be removed.

Chairman Miller. The bill will be considered as read, without objection, and is now open at any place for amendment.

Mr. Engle. I offer the amendments presented in en bloc, the amendments as presented by the subcommittee.

Chairman Miller. Is that satisfactory to you, Mr. Harrison?

Mr. Harrison. Yes.

Chairman Miller. Any discussion or second?

Mr. Wharton. Second.

Chairman Miller. You have heard the motion and the second. All those in favor of the motion to accept the amendments offered en bloc, including the amendment to change the title, will signify by saying aye.

Contrary, no?

It is so ordered.

Mr. Harrison. I move the bill be reported favorably, Mr. Chairman.

Mr. Engle. Second.

Chairman Miller. Those in favor of the motion signify by saying aye.

Contrary, no?

It is so ordered.

(Whereupon, the committee moved to other business.)